TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 32

HOWARD FARMER, PETITIONER,

vs.

ARABIAN AMERICAN OIL COMPANY.

No. 33

ARABIAN AMERICAN OIL COMPANY,
PETITIONER,

vs.

HOWARD FARMER.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 804 PETITION FOR CERTIORARI FILED FEBRUARY 3, 1964
NO. 805 PETITION FOR CERTIORARI FILED FEBRUARY 4, 1964
CERTIORARI GRANTED MARCH 9, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 804

HOWARD FARMER, PETITIONER,

vs.

ARABIAN AMERICAN OIL COMPANY.

No. 808

ARABIAN AMERICAN OIL COMPANY, PETITIONER,

vs.

HOWARD FARMER.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 5, 1964

[fol. A]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOWARD FARMER, Plaintiff-Appellee,

against

ARABIAN AMERICAN OIL COMPANY (a Delaware corporation), Defendant-Appellant.

APPENDIX TO BRIEF FOR DEFENDANT-APPELLANT—
Filed December 19, 1962

[File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD FARMER, Plaintiff,

against

ARABIAN AMERICAN OIL COMPANY (a Delaware corporation), Defendant.

AMENDED COMPLAINT—May 11, 1959

Plaintiff by William V. Homans, his attorney, respectfully shows to the Court and alleges:

First: Upon information and belief that at all times hereinafter mentioned, defendant was, and still is, a corporation organized and existing under the laws of Delaware, authorized to conduct business in the State of New York, and having its principal office at 505 Park Avenue, Borough of Manhattan, City and State of New York.

Second: That at all times hereinafter mentioned, plaintiff was, and still is, a duly licensed physician specializing in the practice of ophthalmology.

Third: That on or about the 13th day of April, 1955, plaintiff and defendant entered into an agreement whereby it was mutually agreed that for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia, plaintiff would be employed by defendant as an ophthalmologist in defendant's installation in the Kingdom of Saudi Arabia, and in consideration therefor defendant would pay plaintiff a salary of $16,000, plus $4,000 living allowance, per annum for such period. That in reliance upon such [fol. 2] promise and agreement by the defendant, plaintiff entered upon such employment.

Fourth: Plaintiff has duly performed all the terms and conditions of said agreement on his part to be performed until on or about the 12th day of March 1956, when defendant breached said contract on its part by discharging plaintiff from employment and refusing to permit him to continue therewith.

Fifth: That as a result of the premises plaintiff has suffered damages to the date hereof in the sum of $59,683, which is the amount plaintiff would have earned and received to date had it not been for the breach of said agreement by the defendant, less the sums earned by plaintiff in the interval.

Wherefore, plaintiff demands judgment against the defendant in the sum of $59,683, with interest from the dates of the payments due plaintiff, together with the costs and disbursements of this action.

William V. Homans, Attorney for Plaintiff.

Dated: May 11, 1959

[fol. 3]

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER

Defendant,

1. Denies each allegation contained in paragraphs of the complaint marked "Fourth" and "Fifth".

2. With respect to paragraph of the complaint marked "First", admits that it was and still is a corporation organized and existing under the laws of Delaware and that it is authorized to do business in the State of New York.

Except as expressly admitted herein, denies each allegation contained in said paragraph of the complaint.

3. With respect to paragraph of the complaint marked "Second", admits that plaintiff was a duly licensed physician specializing in the practice of ophthalmology.

Except as expressly admitted herein, denies knowledge or information sufficient to form a belief as to each allegation contained in said paragraph of the complaint.

4. With respect to paragraph of the complaint marked "Third", admits that the plaintiff was employed by the defendant as an ophthalmologist in defendant's installation in Saudi Arabia, pursuant to written contract, a copy of which is attached hereto as Exhibit A. Denies knowledge or information sufficient to form a belief as to whether plaintiff entered upon such employment in reliance on this contract.

Except as defendant has expressly admitted herein or denied knowledge or information sufficient to form a belief, denies each allegation contained in said paragraph of the complaint.

[fol. 4]

As and for its First Affirmative Defense Alleges:

5. That the agreement alleged in paragraphs "Third", "Fourth" and "Fifth" of the complaint is void as a matter of law because it was not in writing.

As and for its Second Affirmative Defense Alleges:

6. If and in the event that it is found that plaintiff was employed by defendant for a term, defendant alleges that it terminated plaintiff's employment for good cause.

Wherefore, defendant demands judgment dismissing the complaint herein.

White & Case, By Orison S. Marden, A Member, Attorneys for Defendant, 14 Wall Street, New York 5, N. Y.

To:

William V. Homans, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York 17, New York.

EXHIBIT A, TO ANSWER

Contract

(See opposite) ☞

ARABIAN AMERICAN OIL COMPANY
A CORPORATION
505 PARK AVENUE
NEW YORK 22, NEW YORK

EMPLOYMENT IN FOREIGN SERVICE

Dear Dr. Farmer:
Austin, Texas

This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955
annual

Your rate of basic earnings will be U. S. $ 16,000.00

Your initial job classification will be Ophthalmologist

Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.

Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us.

Very truly yours,

ARABIAN AMERICAN OIL COMPANY

By J. A. McDonald

ACCEPTED:

Howard Farmer
Employee's Signature

Mar. 26 1955

EMPLOYMENT IN FOREIGN SERVICE

Dear Dr. Farmer:
Austin, Texas

This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955

Your annual rate of basic earnings will be U. S. $ 16,000.00

Your initial job classification will be Ophthalmologist

Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.

Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us.

Very truly yours,

ARABIAN AMERICAN OIL COMPANY

By J. D. McDonald

ACCEPTED:

Howard Farmer
Employee's Signature

Date: May 26, 1955

AA-188 (12/53)

EA-1

[fol. 6]

IN UNITED STATES DISTRICT COURT

ORDER AMENDING COMPLAINT—June 17, 1960

The above matter having come on before this Court at Chambers on May 12, 1960, on plaintiff's motion to restore this cause for trial and the plaintiff having moved to amend the addendum clause in his complaint to increase the amount of damages demanded to $160,000, and defendant having moved for an examination before trial of plaintiff with respect to damages claimed by plaintiff, and plaintiff having moved to examine defendant by an executive officer with respect to the authority of Dr. Theodore E. Allen to make the contract claimed by plaintiff in his complaint, and the plaintiff having appeared by his attorney, William V. Homans, Esq. and Kalman I. Nulman, Esq. of counsel, and defendant having appeared by its attorneys, White & Case, Esqs., by Chester Bordeau, Esq. and William D. Conwell, Esq. of counsel; and due deliberation having been had, it is

Ordered:

(1) A motion made by plaintiff to amend the addendum clause in his complaint to increase the amount of damages demanded to the sum of $160,000 is granted;

(2) That on or before September 1, 1960 but not later than September 1, 1960, the plaintiff submit to an examination by defendant with respect to his damages, such examination not to be limited to the damages claimed to have been sustained by plaintiff since the time of the trial in 1959 and the time of a new trial but to be limited only by the elimination of any unnecessary repetition of questions heretofore asked of plaintiff;

(3) That on or before September 1, 1960 but not later than September 1, 1960, defendant by an executive officer shall submit to an examination by plaintiff with respect [fol. 7] to the authority of Dr. Allen to make the contract claimed by plaintiff in his complaint; specific scope of the examination as to particular questions will be ruled upon during deposition;

(4) If attorneys for the parties are unable to agree upon the dates for the aforesaid examination to be conducted on dates before September 1, 1960 then such dates shall be fixed by the Court upon two (2) days' application therefor; and

(5) The trial of this action is restored to the head of the trial jury calendar for October 1960 Term.

June 17, 1960.

Sylvester J. Ryan, U. S. D. J.

[fol. 8]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BILL OF COSTS TAXED OCTOBER 30, 1959

1. Attorneys' docket fees	$ 20.00	
2. Stenographers' fees for minutes of hearings and examinations before trial held on 10/8/56, 2/18/58, 1/22/59, 2/6/59, 5/5/59, 5/6/59 and 5/7/59	659.75 ~~697.55~~	
3. Stenographers' fees for minutes of the trial held on May 11-12-13-14-15-18-19-20-21, 1959	1,812.30	Objection overruled exception noted 163 F 2nd 924
4. Costs of making photostats of relevant exhibits	180.02	Objection overruled exception noted
5. EXPENSES OF WITNESS ELIAS FADDOUL:		
Two days attendance at court	8.00	
Five days travelling from Saudi Arabia to New York and back	20.00	Objection overruled exception noted 63 F. Sup. 924
Subsistence during period travelling to and from New York and during period of attendance at court (7 days)	56.00	
Lowest cost first class passage round trip between Saudi Arabia and New York	1,531.50	

[fol. 9]

6. Expenses of Witness Dr. Robert C. Page:		
Eight days attendance at court	$ 32.00	Objection overruled exception noted
Five days travelling from Saudi Arabia to New York and back	20.00	
Cost of transportation by company plane round trip between Saudi Arabia and New York	1,032.00	see ruling item #5
Subsistence during period travelling to and from New York and during period of attendance at court (13 days)	104.00	
7. Expenses of Witness Marjorie Catherine Swanson, R. N.		
8 days attendance at court	32.00	
5 days travelling from Saudi Arabia to New York and back	20.00	
Cost of transportation by company plane round trip between Saudi Arabia and New York	1,032.00	see ruling item #5
Subsistence during period travelling to and from New York and during period of attendance at court (13 days)	104.00	
Subsistence during one day's attendance for deposition	4.00	
8. Expenses of Witness Frank Born, M. D.		
6 days attendance at court	24.00	
9. Expenses of Witness Harold Lohnaas, M. D.		
4 days attendance at court in connection with trial	16.00	
1 day's attendance at court in connection with deposition	4.00	Objection overruled exception noted
Expenses of transportation for appearances at court from Atlantic Highlands, New Jersey to New York (100 miles round trip)	24.00	

[fol. 10]

10. Expenses of Witness Alice Neal, R. N.

2 days attendance at court in connection with trial	$ 8.00
2 days travelling to New York from Wilmington, Delaware and back	8.00
Lowest cost first-class passage round trip between Wilmington, Delaware, and New York	21.46
Subsistence during period travelling to and from New York and during period of attendance at court (4 days)	32.00

11. Expenses of Witness Al Heinz:

Objection overruled exception noted

1 day's attendance at court during trial	4.00
Travelling to court from Wantagh, Long Island and back (50 miles round trip)	~~4.00~~

12. Expenses of Witness Richard L. Meiling, M. D.

Objection overruled exception noted

1 day attendance at court in connection with trial	4.00
Subsistence during period travelling to and from New York and during period of attendance at court (1 day)	8.00
Lowest cost first class passage round trip between Columbus, Ohio, and New York	74.25

13. Expenses of Witness Dominick A. Binetti

Objection overruled exception noted

1 day attendance at court in connection with trial	4.00

Total	~~$6,941.08~~
Oct. 30, 1959 Costs Taxed in Sum of	$6,899.28

Herbert A. Charlson,
Clerk.

By Gilbert E. Surdez,
Deputy Clerk.

[fol. 11]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF CHESTER BORDEAU SWORN TO OCTOBER 26, 1959 IN SUPPORT OF BILL OF COSTS

State of New York,
County of New York, ss.:

CHESTER BORDEAU, being duly sworn, says:

I am an attorney associated with White & Case, attorneys for the defendant. I have been and am in charge of the defense of this action; I tried it before Judge Palmieri. The costs outlined in the Notice of Taxation submitted herewith were necessarily incurred in connection with the defense of this action. I make this affidavit to explain more fully the nature of the various items which appear on the Notice of Taxation.

1. *Docket Fee*: This fee of $20 was incurred and is allowable under U. S. C. A. §1923.

2. *Stenographers' fees for minutes of hearings and examinations*:

Throughout the course of this case opposing attorneys had lengthy and troublesome disputes concerning what had been said at various proceedings. It became apparent to me that orderly procedure made it imperative that all statements made, be taken on the record in order to obviate such disputes.

An example of the difficulties encountered in this respect is the dispute concerning what was said by Court and counsel at the oral argument of a motion on February 18, 1958 before Judge Weinfeld which we had transcribed. This motion was made by defendant for permission to [fol. 12] amend its answer to assert the statute of frauds as a defense and for summary judgment based on this defense. Judge Weinfeld made various statements in connection with the argument and in deciding to permit the defendant to amend its answer.

No sooner was the motion decided, than there was dispute concerning what Judge Weinfeld had said and what the attorneys for both parties had said. This dispute began with a letter from plaintiff's attorney to me dated March 18, 1958 and a letter from him to Judge Weinfeld in connection with the proposed order disposing of said motion. We replied on March 19, 1958. An additional letter was sent by plaintiff's attorney to Judge Weinfeld dated March 20, 1958. Finally the order of Judge Weinfeld was signed.

Plaintiff then made a motion before Judge Dimock (the argument of which was not transcribed) in which plaintiff requested that defendant be directed to produce for inspection, defendant's concession agreement with the Kingdom of Saudi Arabia. Plaintiff contended that this was related to the motion before Judge Weinfeld and referred to statements made by Judge Weinfeld and by opposing counsel on the argument of the motion before Judge Weinfeld. At the argument of the motion before Judge Dimock and in later correspondence the actual transcript was referred to in settling the dispute. The dispute consisted of the following letters after the argument of the motion: a letter from plaintiff's attorney dated March 24, 1958 which was replied to on March 26, 1958; an additional letter from plaintiff's attorney on March 27, 1958; replied to on March 28, 1958; plaintiff's attorneys wrote an additional letter on March 31, 1958 to which we did not reply.

Even on later occasions (at pretrial conferences and at the trial) defendant found it necessary to refer to the transcript of the argument of the motion before Judge Weinfeld to correct what it considered plaintiff's misstatements of

[fol. 13]

what had been said. Thus it is apparent from this outline that it was vitally necessary for defendant to have minutes taken of the argument of this motion as well as of all later proceedings.

It was necessary to have all testimony transcribed not only for use in connection with examination of witnesses but also because there were several important questions of law to be resolved. These questions included the application of the Statute of Frauds to the alleged oral contract and the effect of the Parol Evidence Rule on the facts testified to. In order to resolve both of these questions it was imperative to have the exact testimony of the various witnesses. The following is a breakdown of the minutes taken:

10/8/56: Examination before trial of plaintiff. Excerpts from this examination were read at the trial in order to compare statements made on this examination with statements made by plaintiff at the trial. It was also used as a basis for investigation; it was also used in connection with preparation of the defense. A large number of pages of this examination were read into the record of the trial and were actually requested by the jury for use in their deliberations.....	$188.00	Objection overruled exception noted.
2/18/58: Transcript of argument before Judge Weinfeld of the motion to obtain summary judgment on behalf of defendant on the basis of statute of frauds. Discussed *supra*	17.60	
1/22/59: Pretrial hearing before Judge Palmieri in connection with answers to numerous interrogatories propounded of plaintiff by defendant. Rulings by Judge Palmieri on these interrogatories. This transcript was necessary in order to have a record of the numerous rulings made as well as of statements and representation of counsel.....	89.70	Objection overruled exception noted.

[fol. 14]

2/6/59: Hearing before Judge Palmieri in which rulings were obtained on: 1. the date of trial; 2. plaintiff's request that defendant amplify its answer as to the reasons why it discharged plaintiff; 3. defendant's request that plaintiff specify the total amount of damages he requests in this action rather than in a series of actions. This transcript was extremely useful since Judge Palmieri cited cases in support of his rulings	26.65	
5/5/59: Deposition of Nurse Swanson and Dr. Lohnaas which were conducted by the plaintiff immediately prior to the trial. It was necessary for defendant to obtain copies of this transcript so that it would have them in time for the trial. These transcripts were read from and used at the trial. These were two vital witnesses	298.20	Objection overruled exception noted.
5/6/59: Deposition of plaintiff by order of Judge Palmieri. This deposition was necessary in order for defendant to question plaintiff concerning damages and other matters transpiring since the date of the last examination of plaintiff which was held almost three years earlier	39.60	Objection overruled exception noted
5/7/59: Pretrial hearing before Judge Palmieri with reference to a request by plaintiff that additional witnesses be produced for examination before trial; also with reference to various other questions which might arise at the trial including admissibility of evidence, and questions to be asked on the *voir dire*	37.80	Objection sustained exception noted. Rulings by Court at time of hearing.

All of these depositions and pretrial conferences pertain to issues relevant to this action. Transcripts of these pro-

[fol. 15] ceedings were necessary in order for defendant to prepare for trial and in order for defendant to conduct the trial of this action. They proved an invaluable aid in refreshing the recollection of witnesses, as a check on the veracity of witnesses, and as an aid in making a record of what had transpired including rulings of the court. The depositions referred to were all used during the trial and were read from during the trial.

3. *Stenographers' fees for minutes of trial:*

It was necessary for defendant to obtain a transcript of the trial of this action as it proceeded. A copy of this transcript was furnished to and used by the court. The trial of this case lasted 8 days and the exact phraseology used by the witnesses was of extreme importance. It was of particular importance in connection with the defense of the statute of frauds and in connection with the application of the Parol Evidence Rule. These defenses depended to a great extent upon the exact words used by various witnesses in stating what the terms of plaintiff's employment contract were.

The actual transcript was not only referred to and read by defense counsel into the record at the trial, but it was also referred to and read from by the court.

The jury also requested that various portions of the transcript be sent to them to assist them in their deliberations. Pages from the transcript were actually cut from the volume and sent to the jury and marked as exhibits.

The transcript was also of extreme importance inasmuch as it was necessary for the court to rule on various questions of law during the trial. The transcript with reference to these rulings was actually referred to by the court and counsel at various stages of the trial. Without the transcript as the trial proceeded, confusion and prejudice would have resulted. Because of these factors, it was necessary to obtain a daily transcript of what transpired at this trial.

[fol. 16] 4. *Cost of photostating exhibits*:

It is well established that the cost of photostating exhibits is allowable under 28 U. S. C. A. §1920(4). The bulk of the exhibits for which costs are requested consisted of pages from the American Medical Journal. By photostating these pages it was possible to avoid the inconvenience of handling stacks of actual medical journals which were heavy and cumbersome.

5. *Expenses of witnesses*:

The witnesses who were called to testify on behalf of the defendant and whose expenses are set forth in the notice of taxation were all witnesses of the events which formed the basis of plaintiff's claim. Failure to call any of these witnesses would have been prejudicial to defendant and might have caused unfavorable comment by plaintiff. In my opinion all of the witnesses who testified were vitally necessary in order to present the full facts to the court. An example of the necessity of these witnesses testifying is that of Nurse Faddoul. Defendant learned at the trial, for the first time, that plaintiff claimed he received a laboratory report from Nurse Faddoul, a vital fact at issue. When defendant learned of this it immediately contacted Saudi Arabia and had Nurse Faddoul flown to New York.

For the above reasons the costs set forth in the notice of taxation were incurred by defendant and were necessary in connection to its defense of this action.

Chester Bordeau

Sworn to before me this 26th day of October, 1959.

Robert A. Perkins, Notary Public-State of New York, No. 41-832750-Queens County, Certificate filed in New York County, Term Expires March 30, 1962.

[fol. 17]

AFFIDAVIT OF T. DARRINGTON SEMPLE

State of New York,
County of New York, ss.:

T. Darrington Semple, Jr., being duly sworn says:

I am an attorney employed by Arabian American Oil Company. I was assigned to supervise the defense of the instant action. In this connection I have approved and caused to be paid various bills in connection with this case. All of the items of expense set forth in the bill of costs were actually incurred and paid by the defendant in this action to my own personal knowledge. In my opinion all of these costs were necessary to the defense of this action.

T. Darrington Semple, Jr.

Sworn to before me this 26 day of October, 1959.

Helen L. Babigian, Notary Public, State of New York, No. 03-0123070, Qualified in Bronx County, Commission expires March 30, 1961.

[fol. 18]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHESTER BORDEAU, SWORN TO DECEMBER 2, 1959 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

Chester Bordeau, being duly sworn says:

I am an attorney associated with White & Case, attorneys for the defendant.

I make this affidavit in opposition to plaintiff's motion to review the taxation of costs made by the Clerk of this Court and to set forth the reasons why said taxation and allowance of costs were correct and proper. The two major items of cost objected to by plaintiff are 1. the transcript of testimony and rulings and 2. the cost of transporting witnesses here from Saudi Arabia.

I. *Cost of Transcripts.*

The cost of the transcript of testimony at the trial is Item 3 on the Bill of Costs ($1,812.30) and the cost of the transcript of depositions read at the trial and of pre-trial conferences and the hearing of one motion are Item 2 ($659.75).

That these transcripts are vitally necessary in this trial is apparent from the transcripts themselves. The following are excerpts from the record of the trial:

> "Mr. Nulman: I object on the ground that when I attempted to elicit this matter on my redirect the court sustained defense counsel's objection to that line of questioning.
>
> "Mr. Bordeau: With reference to Mr. Nulman's wanting to go into the merits of that case, your Honor suggested, as I remember it, that the merits of the case should not be gone into. I think that is all that [fol. 19] was done yesterday. I am not talking about the merits of the case.
>
> "Mr. Nulman: I think that is highly unfair and prejudicial for counsel to so state. I started to interrogate, objection was made, and your Honor directed me to ask no further questions and I desisted.
>
> "The Court: I don't believe I ruled out any question at all with respect to the litigation. I merely wish to avoid any inquiry into the issues of any other litigation, or the nature of any other litigation, and I have already stated on the record the limited purpose for which I would permit reference to other litigation. *I am trying to find the place in the record at which this occurred. As soon as I do, I will be able to speak with greater reliance.*
>
> "Mr. Nulman: I respectfully suggest to your Honor that merely eliciting the fact of the existence of the lawsuit gives rise to many implications which I have a right to rebut by showing the nature of that litigation, and that was my argument yesterday, and I respectfully repeat it today.

"The Court: Do I understand you correctly then to say that you withdraw your objection provided you can go into the nature of this litigation?

"Mr. Nulman: No, your Honor, I don't want to withdraw the objection on the basis that was advanced yesterday. I would like rulings made as we proceed, and I say that if it was proper to sustain an objection yesterday, then it ought to be sustained today.

"The Court: I think you are quite right. The law does not change from day to day, if that is what you are implying.

"Mr. Nulman: No, I wasn't, your Honor. I was making no such implication. *I was suggesting that the rulings change from day to day.*

[fol. 20] "The Court: *You are making that suggestion. I suggest you had better point out in the record wherever the rulings changed from day to day, and I assure you it will be corrected so they will be fully consistent and in conformity with prior rulings.*

"Mr. Nulman: I must say that I don't believe it serves my client's interest for me to engage in this. I simply state the fact that I object on the ground stated.

"The Court: *I am trying to find the place. As soon as I do, we can make some progress.*

I think it begins at page 221, the series of questions with respect to Robert Farmer.

"Mr. Bordeau: If your Honor please, may I submit to you my copy of the transcript of yesterday and refer you to pages 251 and 252?

"The Court: I have just read it.

There was a comment which I had opposed on page 252, and there was colloquy that occurred on pages 252 and 253 of the record.

"Mr. Nulman: So that there may be no misunderstanding, your Honor, I do not have a copy of the record.

"The Court: I will show it to you.

"Mr. Nulman: I quite accept what your Honor states, but I merely wanted you to know I didn't have it.

"The Court: Very well, I will make sure that you take a look at this before I make a ruling.

Yesterday I said this, and I adhere exactly to what I said yesterday." (reading transcript) (pp. 314-317 emphasis added)

• • • • • • •

"The Court: This is your trial, this is your only trial, and when you submitted on the first day of trial [fol. 21] an amended complaint in which you claimed damages only those damages which apply to the period between the date of the discharge and the date of the trial, I asked you point blank whether you were attempting, by that maneuver, to reserve to yourself the right to claim damages at a subsequent time, and you said that you had no such intention whatsoever, and I want to refer you to the record.

"I refer you to pages 2 and 3 of the record in which I made it perfectly clear, and I quote:" (pp. 1018-1019)

• • • • • • •

"Mr. Nulman: • • • Now, we are not altogether sure that good motives or good faith are issues in this case—

"The Court: Oh, how can you say it? How can you say it?

Let me read your opening to the jury. It is fantastic to me that you can make that statement—

"Mr. Nulman: Your Honor, I said—

"The Court: Just a minute. *I want to stop you right there because this record will be in a state of frightful confusion, and I want to help any appellate court that is going to have this case.*

"Mr. Nulman: Your Honor, I know what—

"The Court: This is your opening to the jury. I will read from the bottom of page 11:" (reading) (pp. 1027-1028)

In connection with a lengthy conference in connection with the admission of exhibits, Judge Palmieri stated:

"Mr. Nulman: May I recall to your Honor certain facts with relation to Dr. Allen—

[fol. 22] "The Court: No. We have been in this conference now for 45 minutes, *and as you see, I have had the benefit of this record, which I have been taking home every night and reading, so I have a pretty good idea—*

"Mr. Nulman: I was going to point out that this letter has a direct bearing on what I consider an improper issue injected by Mr. Bordeau wherein he was permitted to put into evidence the original complaint showing only that we asked for $4000 damages, and this letter indicates—

"The Court: Where he was permitted to put in. Did you object?

"Mr. Bordeau: He did not object.

"Mr. Nulman: I did object.

"Mr. Bordeau: He did not object.

"The Court: Let's get that right away. When did you put it in?

"Mr. Bordeau: On the cross examination of Dr. Farmer.

"Mr. Nulman: I don't remember—I just—

"The Court: You have just made a statement that he was permitted to do something over your objection. I am going to stop this right now. *You have been making statements all along in this case that haven't been in accord with my recollection, and I want to stop it right now, if I can, by reference to the record.*" (reads record) (1249-1252)

Even the jury felt the need for the transcript. After hours of deliberation they made the following request:

"The Court: Counsel have just completed examining the record for the purpose of answering the following note from the jury:

[fol. 23] Can we see Dr. Farmer's *pretrial* testimony regarding the receipt of blood test and urinalysis report—and *trial* testimony of above-mentioned matter?"

(Above note marked Court's Exhibit 5 in evidence.)

"The Court: My judgment is that since they requested to see these minutes, they should be permitted

to do just that. Unless counsel have some objection my judgment would be to remove those pages of the record which counsel have agreed complies with this request and have those pages sent in.

"Mr. Homans: Your Honor, I think that probably reading them would be the best procedure because there are probably other things on the pages which they might not be interested in.

"The Court: If they do not pertain to this subject I suggest cutting them out. Mr. Homans was saying there might be other things on certain pages which did not pertain to this subject, and my suggestion was just to cut them out.

"Here is my thought, Mr. Homans: reading testimony is the usual practice, but it has this disadvantage, that some persons have good oral sensibilities; others do not. And it might cut both ways. There might be some difficult aspects of it that will bounce off some of those and catch others, whereas this way I think they will all get whatever benefit is to be gotten from it by seeing it, and the request is to see it, and I always like to adhere precisely to what the jurors ask for.

"Now, since this is the trial testimony and they have asked to see it, it is my judgment that they should be permitted to do just that." (pp. 1409-1410)

[fol. 24] To comply with that request it was necessary for counsel to examine the entire transcript. The testimony requested was given at a number of different places in this 1400 page record. It would have been a physical impossibility for a reporter in any reasonable length of time to have been able to find such testimony and put it together. It was necessary for the attorneys to glance at almost every page of the transcript to find this testimony. For a reporter to find it would have meant practically a complete re-reading to the attorneys of the entire record.

It is apparent from the quotations from the transcript given above why it was necessary for the pretrial hearings at which Judge Palmieri made numerous important rulings governing the trial and at which counsel made stipulations and representations, to be transcribed. The same is true

with reference to the argument of the motion before Judge Weinfeld as outlined in my affidavit sworn to October 26, 1959. If these proceedings had not been transcribed there would have been endless dispute concerning what had been said.

For these reasons and for the reasons set forth in my affidavit sworn to October 26, 1959 submitted in support of the Bill of Costs, it is apparent that these transcripts were necessarily obtained for use in this case. The trial was long, the factual issues complex and closely contested. The transcript was used by the Court, by counsel and was requested by the jury. The taxation of the costs of this transcript by the Clerk of this Court should therefore be affirmed.

Plaintiff objects to taxing the cost of the transcript of the trial claiming that it was not necessary, that he did not get a copy and that it was not filed. We have shown *supra*, it was necessary. Plaintiff could have ordered a copy for himself—defendant has no obligation to pay for a copy for [fol. 25] plaintiff. The transcript was filed. As is apparent from the above excerpts the trial judge at all times had a copy of the transcript which he read and studied. In fact the transcript furnished Judge Palmieri by defendant and filed by Judge Palmieri was used by plaintiff in the making of his record on appeal.

Plaintiff also objects to taxing the cost of the transcripts of the depositions of Swanson and Lohnaas. The trial was scheduled to begin and did begin on Monday, May 11, 1959. On May 5, 1959, a Tuesday, plaintiff spent most of the day examining these two key defense witnesses.

Since there were literally only three business days between these depositions and the trial, it was imperative for defendant to be certain that the transcript of these examinations was available to it before the trial. Defendant had no way of knowing when these witnesses would actually be called to testify; when they testified would depend on when plaintiff's testimony was completed which could easily have been the first day of trial. In order to be certain that defendant had this transcript prior to the trial defendant had the Southern District Court reporters

transcribe this testimony rather than rely on receiving a copy from the private firm hired by plaintiff.

Plaintiff also objects to taxing the cost of transcript of the deposition of plaintiff taken just before the trial. The purpose of this examination was to fill in the gap since plaintiff's original examination several years before. The subject of this examination was activities of plaintiff since his last examination; such activities related to efforts to mitigate damages, etc.

Defendant objects to Item 9 which is the expense of transporting Dr. Lohnaas from his New Jersey home to court. (Item 9) Dr. Lohnaas was not working at defendant's New York Office at the time of the trial and would [fol. 26] have stayed in New Jersey during this period if he had not been required to come here to testify.

II. *Photostats*

It cost $180.02 to photostat relevant pages from the AMA Journal. This cost was necessary to avoid working with complete heavy volumes of these journals which literally required three men to carry. The pages were relevant and were marked in evidence.

For these reasons the taxation of costs by the Clerk of this Court should be affirmed.

Chester Bordeau.

Sworn to before me this 2nd day of December, 1959.

Robert A. Perkins, Notary Public, State of New York, No. 41-8327500. Qualified in Queens Co., Cert. filed with N. Y. Co. Clks. Off., Commission Expires March 30, 1960.

[fol. 27]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. PAUL MILLER SWORN TO DECEMBER 2, 1959 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

E. PAUL MILLER, being duly sworn, deposes and says:

That he is employed by the Arabian American Oil Company in the Transportation Section of the Personnel Department and in such capacity has charge of making reservations and purchasing airline tickets for employees of the Arabian American Oil Company who will be travelling on company business. In such capacity your deponent is familiar with the cost of air transportation and makes this affidavit in support of the taxation of costs done by the Clerk of this Court. In particular, I make this affidavit with reference to Item 5 of the Bill of Costs to show that the lowest cost first class air fare round trip between New York and Dhahran, Saudi Arabia is $1,531.50 and to establish that defendant in fact paid that amount to transport the witness Fadoul here.

Attached hereto as Exhibit "A" is a photostatic copy of the receipted Trans-World Airways, Inc. invoice for $1,531.50 paid by the defendant for the transportation of witness Elias Fadoul. Attached hereto as Exhibit "B" is a schedule from Trans-World Airways, Inc. showing that this is the lowest cost first-class passage between Saudi Arabia and New York.

Attached as Exhibits "C" and "D" are publications of other airlines showing their rates. Exhibit "E" is an excerpt from the Official Airline Guide, World Wide Edition showing the rates for all airlines are the same.

On information and belief they are the same because all international air fares to and from the United States [fol. 28] are controlled by treaty and various United States Governmental organizations.

E. Paul Miller

Sworn to before me this 2nd day of December, 1959.

William M. Trust, Notary Public, State of New York, No. 24-4027650, Qualified in Kings County, Certs. filed with Kings & N. Y. Co. Clk's., Term Expires March 30, 1961.

In United States District Court

Affidavit of Robert J. Shea, Sworn to December 2, 1959 in Opposition to Motion to Review Taxation of Bill of Costs

State of New York,
County of New York, ss.:

Robert J. Shea, being duly sworn, deposes and says:

That he is an accountant employed in the Comptroller's Department of the Arabian American Oil Company and as such has charge of and is familiar with the method by which the Arabian American Oil Company computes its costs for air travel on company plane to and from Dhahran, Saudi Arabia.

I make this affidavit in support of the taxation of costs done by the Clerk of the Court with particular reference to Items 6 and 7 of the Bill of Costs. These items represent [fol. 29] the cost of transporting two witnesses (Page and Swanson) by company plane to New York from Saudi Arabia and back.

The amount of $1,032 which has been taxed as the cost of transporting each of these witnesses represents the actual cost to defendant of transporting these witnesses. This amount is about $500 less than the lowest cost first class passage on commercial airlines as outlined in the affidavit of Paul E. Miller submitted herewith. This actual cost is arrived at by computing the total cost to defendant on a yearly basis of the operation of its airplanes.

In computing the actual cost of operation of such planes defendant includes the cost of gasoline, lubrication, crew salaries, crew expenses, meals for crew and passengers, crew personnel training, office operating expense at Idle-

wild allocable to such planes, charges for maintenance materials, maintenance personnel, ground approach services, landing, parking and storage fees at airports, ground handling charges, cost of inspection, repair and overhaul of aircraft, engine, propellers, parts and assemblies, etc.

Defendant then totals the number of passengers and pounds of freight it carries in a particular year and these figures are then converted into what it would cost to ship these goods or to fly these persons via commercial airlines. These figures are totalled to show what commercial costs would be.

The commercial costs used are the standard public tariffs as set forth in the "Official Airline Guide" which publishes the public tariffs set by the airlines in accordance with U. S. Governmental agencies and international treaty. The commercial rates are then totalled and this figure is divided into Aramco's cost figure to receive the percentage of the Arabian American Oil Company's costs as compared to commercial costs. This percentage figure is then used [fol. 30] to show what it costs the Arabian American Oil Company for each individual to fly on its planes.

This computation is made each year on the basis of an estimate of costs and travel load. At the end of each year the estimate is adjusted to accord with what the actual facts are.

These estimated figures from the years 1955 to 1958 have never varied from the actual costs by more or less than 11.4%, with an average of 5.54%. For the year 1959 the actual cost of such transportation per passenger was estimated to be $1,032.00 which is the amount taxed as costs in Items 5 and 6 of the Bill of Costs and which is about $500 less than the lowest cost first class passage.

R. J. Shea.

Sworn to before me this 2nd day of December 1959.

William M. Trust, Notary Public, State of New York, No. 24-4027650, Qualified in Kings County, Certs. filed with Kings & N. Y. Co. Clk's., Term Expires March 30, 1961.

[fol. 31]

Appearances:

William V. Homans, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York City.

White & Case, Esqs., Attorneys for Defendant, 14 Wall Street, New York City.

Chester Bordeau and William Conwell, Esqs., of Counsel.

OPINION—December 10, 1959

PALMIERI, J.

This is a motion brought by plaintiff, the losing party in the above-entitled action, to review the rulings of the Clerk of this Court in taxing certain costs and for an order retaxing costs.

Plaintiff questions the propriety of costs allowances for the following items:

1.	Stenographers' fees for minutes of pretrial hearings	$ 133.95[1]
2.	Stenographers' fees for examination before trial	
	(a) Depositions of Marjorie Catherine Swanson, R.N., and Dr. Harold Lohnaas	298.20
	(b) Deposition of the plaintiff	39.60

[fol. 32]

3.	Stenographer's fees for daily minutes of the trial	1,812.30
4.	Costs of making photostats of relevant exhibits	180.02

[1] Plaintiff, through inadvertence, lists among his objections stenographer's fees for a hearing held on May 7, 1959. The Clerk sustained plaintiff's objection to this item and made the necessary deduction from the bill of costs.

5. Expenses of witnesses

(a) Elias Faddoul ..... ($1,531.50 of the total represents cost of transportation)	1,615.50
(b) Dr. Robert C. Page ..... ($1,0[illegible] represents cost of transportation)	1,188.00
(c) Marjorie Catherine Swanson, R.N. ($1,032 represents cost of transportation)	1,192.00
(d) Dr. Harold Lohnaas	44.00

1. Stenographers' fees for minutes of pre-trial hearings.

Plaintiff objects to the charges for transcripts of the minutes of three pre-trial hearings. In view of the nature and extent of these conferences and the importance of the rulings which were entered, I am of the opinion that it was necessary to have a full record of the arguments, stipulations, and representations made by counsel. Since I have concluded that the transcripts were essential to a proper understanding of matters covered at the conferences and that reliance on memory and notes would have placed a severe burden on the Court as well as counsel, I exercise my discretion to allow these costs as taxed by the Clerk. See Rule 54(d), Fed. R. Civ. P. and 28 U. S. C. §1920(2), *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924, 931-32 (S. D. N. Y. 1958).

[fol. 33] 2(a). Depositions of Marjorie Catherine Swanson, R.N., and Dr. Harold Lohnaas:

Examinations of these important witnesses were conducted by the plaintiff on May 5, 1959. Rather than rely on receipt of copies from the plaintiff, who had hired a private reporter, defendant ordered the preparation of additional transcripts by a court reporter. However, immediately prior to the trial, which commenced on May 11, 1959, plaintiff did furnish defendant with copies of the depositions. I agree that transcripts of the depositions were necessary for use in the case. However, I cannot agree that

plaintiff failed to do all that the circumstances required when he deliverd copies just before the trial. During the six days which elapsed between the examinations and receipt of plaintiff's transcripts defense counsel had recourse to his notes and fresh recollection of the depositions. I believe that the precaution which defendant took in ordering its own copies was for its own convenience and cannot be properly charged against plaintiff. See *Cooke* v. *Universal Pictures Co.*, 135 F. Supp. 480, 482 (S. D. N. Y. 1955). Accordingly, I sustain plaintiff's objection and direct that the charge of $298.20 be disallowed.

2(b). Deposition of Plaintiff.

Plaintiff objects to the charge for the examination conducted on May 6, 1959 on the ground that defendant had conducted an earlier examination of plaintiff on October 8, 1956. Plaintiff sought to recover for breach of an employment contract. More than two and a half years had elapsed since the date of the first deposition. In view of the extensive damages claimed by plaintiff at this stage of the case, defendant could not adequately prepare for trial without supplemental information relating to plaintiff's efforts to mitigate damages and other events which had transpired since the date of the first examination. Under the circum- [fol. 34] stances the cost of the transcript of plaintiff's second deposition was properly taxed as an item "necessarily obtained for use in the case." 28 U. S. C. §1920(2), *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), *reversed on other grounds*, 219 F. 2d 173, *cert. denied*, 349 U. S. 952 (1954); 4 Moore, Federal Practice, ¶26.36 (2d ed. 1950).

3. Stenographer's fees for daily minutes of the trial.

On frequent occasions throughout the course of this trial the Court and counsel found it necessary to review prior testimony, issues and rulings. At such times, the daily transcript was more than a helpful aid to the Court. To avoid disagreements with respect to the prior course of the trial proceedings it became essential to have the record on hand for constant and immediate reference. In view of the many difficulties which were resolved by recourse to

the daily minutes, I find no merit to plaintiff's objection that the transcript was not necessary for the conduct of the trial. I therefore affirm the Clerk's allowance of costs for the full stenographic transcript of trial proceedings. See *Bank of America* v. *Loew's International Corp., supra.*

4. Costs of making photostats of relevant exhibits.

To avoid the considerable inconvenience of dealing with a number of publications which in the aggregate would have been heavy and cumbersome, defendant prepared photostats of relevant pages from medical journals. I find that these photostats were "necessarily obtained for use in the case" and therefore affirm the taxation of this item by the Clerk. See 28 U. S. C. §1920(4), *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259, 266 (W. D. Mo. 1951).

5. Expenses of witnesses.

(a) Elias Faddoul, (b) Dr. Robert C. Page,

(c) Marjorie Catherine Swanson, R.N.

[fol. 35] The costs of subsistence and the per diem allowances for time spent in court and in travelling from Saudi Arabia to New York and back were properly taxed. 28 U. S. C. §1821 (1958). As to witness Faddoul, defendant has submitted adequate proof that it paid the amount of $1,531.50 for air transportation and that this sum represents the lowest first-class rate. The Clerk's action in taxing in full the expenses of witness Faddoul is affirmed. See *Bank of America* v. *Loew's International Corp., supra.* Decision is reserved as to the allowance of the costs of air transportation for Dr. Page and Nurse Swanson pending receipt of a supplementary affidavit from defendant. In the affidavit, defendant should set forth the defendant's policy, if any, with respect to the full use of cargo and passenger transportation space on company planes and the extent to which capacity loads were carried. Defendant should also state, if possible, whether defendant's planes operated on fixed schedules, regardless of loads, whether full loads

were carried on the dates these witnesses were passengers, and whether space would have remained vacant if Dr. Page and Nurse Swanson had not occupied seats.

(d) Dr. Harold Lohnaas.

The Clerk's taxation of costs in the amount of $20.00 for Dr. Lohnaas' attendance at court is affirmed. 28 U. S. C. §1821 (1958). Decision is reserved as to the allowance of $24.00 for transportation expenses pending receipt of an affidavit from Dr. Lohnaas or his immediate supervisor stating the nature of his duties and responsibilities and the place where they would have been performed if Dr. Lohnaas had not been in attendance at court.

Conclusion

The Court affirms the taxation of costs by the Clerk with the following exceptions:

[fol. 36] 1. The sum of $298.20 for the depositions of Marjorie Catherine Swanson, R.N., and Dr. Harold Lohnaas is disallowed;

2. The sum of $2,064.00, representing air transportation costs for Dr. Robert C. Page and Marjorie Catherine Swanson, R.N., shall not be included in the judgment until further order of the Court;

3. The sum of $24.00 for transportation expenses of Dr. Harold Lohnaas shall not be included in the judgment until further order of the Court.

So Ordered.

Dated: New York, N. Y.
December 10, 1959

Edmund L. Palmieri, U. S. D. J.

[fol. 37]

IN UNITED STATES DISTRICT COURT

Appearances:

William V. Homans, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York City.

White & Case, Esqs., Attorneys for Defendant, 14 Wall Street, New York City.

Chester Bordeau and William Conwell, Esqs., of Counsel.

OPINION—February 9, 1960

PALMIERI, J.

On December 10, 1959, in response to a motion brought by the plaintiff, the Court reviewed the rulings of the Clerk in taxing costs and reserved decision as to two specified items pending receipt of supplemental affidavits from the defendant.

The defendant has complied with the Court's direction and has submitted requested information as to the following items:

1. Air Transportation Costs for Dr. Robert C. Page and Marjorie Catherine Swanson, R.N.	$2,064.00
2. Transportation Expenses of Dr. Harold Lohnaas	24.00

1. It appears from the affidavit of the defendant's Aeronautical Engineer that Dr. Page and Nurse Swanson were transported on company planes which operated on fixed schedules and that on the dates these witnesses travelled there was vacant passenger space on board the planes. While there would have been unoccupied seats [fol. 38] whether or not Dr. Page and Nurse Swanson were assigned to flights, it cannot be said that the defendant incurred no expense in bringing these important witnesses to New York to appear at the trial. The method which the defendant used to allocate the costs of operating its airlines

appears to accord with sound accounting practice. Therefore, the pro rata share attributed to the flights of Dr. Page and Nurse Swanson, which is considerably lower than the cost of commercial airline travel, was properly taxed by the Clerk. See *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924, 928-30 (S. D. N. Y. 1958); *Maresco* v. *Flota Mercantile*, 167 F. Supp. 845 (E. D. N. Y. 1958).

2. The affidavit of the Physician in charge of the defendant's Medical Department in New York states that the defendant did not require the services of Dr. Lohnaas in New York and that his trips during the trial were especially for the purpose of giving testimony. In view of these representations I find that the travel allowance for Dr. Lohnaas of $24.00 was properly taxed by the Clerk.

Conclusion

The Court affirms the allowance of costs by the Clerk as to both of the above-mentioned items.

So Ordered.

Dated: New York, N. Y.
February 9, 1960

Edmund L. Palmieri, U. S. D. J.

[fol. 39]

IN UNITED STATES DISTRICT COURT

BILL OF COSTS TAXED JULY 7, 1961

I. COSTS INCURRED IN CONNECTION WITH THE FIRST TRIAL OF THIS ACTION IN MAY 1959		Objection overruled Exception noted deposition precluded in both trials
Costs incurred by defendant in connection with the first trial of this action as taxed by the Clerk of the Court and as reviewed and modified by Judge Palmieri*	$6,601.08	
II. COSTS INCURRED IN CONNECTION WITH AN APPEAL BY PLAINTIFF FROM THE JUDGMENT ENTERED ON JULY 28, 1959 DISMISSING THE COMPLAINT		
A. Cost of printing 50 copies of Appellee's Brief and Appendix in connection with the Appeal	~~1,799.07~~	Objection sustained Exception noted not incurred in District Court
B. Cost of printing a Petition for Rehearing of its decision reversing the July 28, 1959 judgment, addressed to the United States Court of Appeals for the Second Circuit	~~124.21~~	
C. Cost of printing a Petition for a Writ of Certiorari to the United States Supreme Court to review the decision of the United States Court of Appeals for the Second Circuit which vacated the judgment of July 28, 1959 and which remanded the case for a new trial	~~622.37~~	

* The costs incurred by defendant in connection with the first trial of this action, which took place in May 1959, were taxed by the Clerk of this Court on October 30, 1959. [A copy of the Bill of Costs as taxed by the Clerk is attached as Exhibit A]. On November 3, 1959 plaintiff made a motion to review the taxation of these costs. On December 10, 1959, Judge Palmieri (who presided at the first trial of this action) rendered an opinion which substantially affirmed the costs as taxed by the Clerk. [A copy of this opinion is attached as Exhibit B]. On February 9, 1960, Judge Palmieri further modified the Bill of Costs. [A copy of this opinion is attached as Exhibit C].

[fol. 40]

D. Cost of printing a Reply Brief in connection with a petition made by defendant for a Writ of Certiorari to the United States Supreme Court	~~110.00~~	Objection sustained exception noted not incurred in District Court
E. Fees for filing a Petition for a Writ of Certiorari	~~100.00~~	
F. Amount paid to plaintiff to reimburse plaintiff for his costs on this appeal	~~644.24~~	

III. Costs in Connection With Motion Made By Defendant to Require Plaintiff to Post Security for Costs in Connection With the Second Trial of This Action.

A. Stenographers' fees for transcribing the minutes of proceedings held on September 14, 1960 and October 11, 1960 in connection with a motion made by defendant for Security for Costs	~~107.60~~	Objection sustained portion requested by Court furnished by plaintiff not included in this transcript exception noted
B. Cost of printing 60 copies of a Brief and Appendix in opposition to an appeal to the United States Court of Appeals for the Second Circuit filed by plaintiff from an order of Judge Levet requiring plaintiff to post Security for Costs in connection with the new trial of this action	~~517.46~~	Objection sustained exception noted not incurred in District Court
C. Cost of printing 50 copies of a Petition for a Rehearing of the decision of the Circuit Court setting aside the order of Judge Levet	~~119.95~~	
D. Amount paid to plaintiff to reimburse plaintiff for his costs on this appeal	~~220.25~~	

[fol. 41]

IV. Costs in Connection with Second Trial of this Action in February 1961

A. Stenographers' fees for transcribing the minutes of proceedings held on September 26, 1960 in connection with plaintiff's motion for adjournment of the trial	~~2.00~~	Objection sustained not ordered or used by Court exception noted
B. Stenographers' fees for the minutes of an examination before trial of the plaintiff, Dr. Howard Farmer, conducted by defendant on October 14, 1960	138.75	Objection overruled exception noted order of Judge Ryan dated July 28, 1960
C. Expenses of Witness Dr. Robert C. Page		
Two days attendance at court	8.00	No objection
D. Expenses of Witness Dr. Richard L. Meiling:		
(1) One day attendance at court in connection with trial	4.00	
(2) Subsistence during period traveling to and from New York and during period of attendance at court (1 day)	8.00	Objection overruled exception noted witness present and testified
(3) Lowest cost first class passage by air, round trip, between Columbus, Ohio and New York	78.32	
E. Expenses of Witness Alice Neal, R. N.		
(1) One day attendance at court in connection with trial	4.00	
(2) One day traveling from Dover, Delaware to New York and return	4.00	No objection
(3) Subsistence during period traveling to and from Wilmington, Delaware and during period of attendance at court (2 days)	16.00	

[fol. 42]

(4) Lowest cost first class passage, round trip between Wilmington, Delaware and New York	24.20	No Objection
F. Expenses of Witness Elias Faddoul		
(1) One day attendance at court	4.00	Objection overruled witness present and testified except'n noted
(2) Four days traveling from Beirut, Lebanon to New York and return	16.00	
(3) Subsistence during attendance at court and during travel from Beirut, Lebanon and New York (5 days)	40.00	Objection overruled exception noted 163 F. Sup. 924
(4) Lowest cost first class passage, round trip between Beirut, Lebanon and New York	1,442.90	
G. Expenses of Witness Dr. Harold Lohnaas		
(1) One day attendance at court in connection with trial	4.00	
(2) Subsistence during attendance at court (1 day)	~~8.00~~	On consent
(3) Expenses of transportation for appearance at court from Tuxedo Park, New York and return (160 miles @ ~~24~~ cents a mile)	~~38.40~~	
8 cents	~~19.20~~ 12.80	
H. Expenses of Dr. Frank Born		
(1) Three days attendance at court	12.00	Objection to item H overruled exception noted witness present and testified
(2) Five days traveling from Dhahran, Saudi Arabia to New York and return	20.00	
(3) Eight days subsistence in connection with attendance at court and during travel between Dhahran, Saudi Arabia to New York	64.00	

[fol. 43]

(4) Lowest cost first class air passage, round trip, between Dhahran, Saudi Arabia and New York	1,639.50	Objection overruled exception noted 163 F. Sup. 924
I. Expenses of Witness Marjorie Catherine Swanson, R. N.		
(1) Two days attendance at court	8.00	Objection to item I overruled exception noted witness present and testified
(2) Two days traveling from Tacoma, Washington to New York and return	8.00	
(3) Subsistence in connection with appearance in court and in connection with traveling to and from New York (4 days)	32.00	Objection overruled exception noted 163 F. Sup. 924
(4) Lowest cost first class air passage between Tacoma, Washington and New York	380.67	
J. Stenographers' fees for minutes of the trial of this action held on March 20, 21, 22, 23, 24, 27, 28, 29, 1961	1,329.90	Objection overruled exception noted 163 F. Supp. 924; 116 F. Supp. 102
Total	$16,413.67	
~~adjusted total~~ ~~11~~ deduction	4,513.55	
adjusted total	$11,900.12	

Costs taxed

July 7, 1961 ~~Judgment~~ in favor of the defendant against plaintiff in sum of $11,900.12

HAROLD A. CHARLSON (G. E. S.)
Clerk

[fol. 44]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHESTER BORDEAU SWORN TO JUNE 30, 1961 IN SUPPORT OF BILL OF COSTS

State of New York,
County of New York, ss.:

Chester Bordeau, being duly sworn says:

I am an attorney associated with White & Case, attorneys for the defendant. I am in charge of the defense of the above action which resulted in a jury verdict for defendant which plaintiff has not appealed. The costs outlined in the Bill of Costs submitted herewith were necessarily incurred in connection with its defense.

I make this affidavit to explain more fully the nature of the various items of cost.

I. Costs in Connection With the First Trial

This action was tried before Judge Palmieri for almost two weeks in May 1959. When the jury failed to reach agreement, Judge Palmieri dismissed the complaint for insufficiency as a matter of law. In connection with the judgment entered dismissing the complaint, defendant taxed a bill of costs. This bill of costs was reviewed on a motion made by the plaintiff and considered by Judge Palmieri on two occasions. A copy of the Bill of Costs as modified by Judge Palmieri is attached to the instant Bill of Costs as Exhibit A; decisions of Judge Palmieri in connection with this Bill of Costs are attached as Exhibits B and C.

Having presided over the first trial Judge Palmieri thoroughly examined each item of cost claimed in terms of his own first hand knowledge and ruled that the costs as taxed were necessarily incurred and were allowable costs. It might also be noted that some of the items taxed as costs on the first trial are also costs of the second trial. For example the transcript of the proceedings of the first trial [fol. 45] ($1,812.30) was quoted on no less than 77 pages of the transcript of the second trial. Similarly the transcript

of examinations before trial ($695.75) were quoted on no less than 50 pages of the transcript of the second trial. Most interestingly, plaintiff's own attorney read from these transcripts on far more occasions than did defendant's attorneys. The reason was that most of the witnesses who testified were called by defendant and plaintiff's attorney's method of procedure was to attempt to impeach these witnesses by reading long excerpts from their prior testimony, given either at the first trial or at their examination before trial.

While these substantial costs were in fact costs of the second trial to an even greater extent than they were of the first trial; they are included under Item I of this Bill of Costs and, of course, are not repeated elsewhere in the Bill of Costs.

II. Costs in Connection with Plaintiff's Appeal

Defendant actually incurred the printing and other costs set forth in connection with plaintiff's appeal from the judgment dismissing the complaint. These costs were necessarily incurred by defendant in the defense of this action, which a jury eventually found to be without merit. Needless to say, defendant's actual expenses in connection with this appeal were greatly in excess of the costs here taxed.

III. Costs in Connection with Motion for Security for Costs

In order to protect itself from the possibility of plaintiff's being unable to reimburse defendant for costs defendant incurred in the event (as actually happened) a verdict was rendered in favor of defendant, defendant made a motion to require plaintiff to post security for costs. Judge Levet granted this motion and plaintiff appealed to the [fol. 46] Circuit Court which reversed Judge Levet's decision. The expenses in connection with this effort by defendant to get security for costs were necessarily incurred by defendant and should be refunded to it.

IV. Costs in Connection with the Second Trial

Items A and B pertain to stenographers' fees in connection with minutes of proceedings immediately preceding the second trial of this action. Defendant conducted an

examination before trial of plaintiff. Copies of the minutes of these proceedings were essential to the defense of this action and the cost of the minutes were necessarily incurred by defendant.

Items C, D, E, F, G, H and I pertain to expenses to various witnesses. This action involved sharply contested issues of fact, concerning which a number of people were direct witnesses. It was necessary for defendant to defend the charges made by plaintiff by calling persons to testify who had knowledge of the facts. The personal testimony of these witnesses was indispensable. Plaintiff's claims specifically involved persons named by plaintiff who were located in the Middle East. Defendant could not hope to refute these claims without calling these persons to testify.

One of the central issues of the case was whether plaintiff had the results of laboratory tests on a patient before proceeding with an operation. He had testified that he had obtained these results from Mr. Faddoul. Mr. Faddoul testified that he had not given plaintiff these results. It was necessary for defendant to call Mr. Faddoul to testify so that the jury could see Mr. Faddoul and appraise his credibility. Use of depositions would have been unsatisfactory on this central issue of this case.

Similarly Dr. Born and Nurse Swanson had first hand knowledge of the transactions in question and it was impor-[fol. 47] tant to the defense to present them in the courtroom for the jury to appraise their credibility.

Item J covers the expenses of transcripts of the trial in this case. This transcript was used by defendant throughout the trial. It was referred to in the record and before the jury on at least six occasions by counsel and to the best of my knowledge it was also referred to and used by the Court during the trial. In a case involving a number of sharply contested issues of fact on a trial lasting almost two weeks, an accurate transcript of what each witness has testified to is indispensable.

For the above reasons the costs set forth in the Bill of Costs were necessarily incurred by defendant in connection with the defense of this action and should be awarded to it.

The jury, after a trial commencing on March 20, 1961 and ending on March 29, 1961, found plaintiff's claims to be

without merit. The claims made by plaintiff were exceedingly serious in that they raised questions concerning defendant's general employment policy and whether defendant employed persons for term or at will. Plaintiff also made grave charges against defendant and its medical staff in that he claimed that he was discharged because he made honest diagnoses. He claimed that defendant wanted him to make dishonest diagnoses so that it could keep from its personnel the fact that a serious eye disease was allegedly being contracted by defendant's American personnel. In view of the charges made by plaintiff, it was necessary for defendant to make every effort to present the full facts to the jury which it did. Upon hearing defendant's witnesses and upon listening to the full facts, the jury found there was no merit to the claims made by plaintiff. Needless to say, the actual expenses incurred by defendant in connection with this groundless litigation were many, many times the amount requested in this Bill of Costs.

[fol. 48] The costs set forth in the Bill of Costs should be taxed in favor of defendant.

Chester Bordeau.

Sworn to before me this 30th day of June 1961.

Edna G. Watrous, Notary Public, State of New York, No. 24-9549550, Qualified in Nassau County, Certificate filed in New York County, Commission Expires March 30, 1962.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHESTER BORDEAU SWORN TO DECEMBER 11, 1961 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

Chester Bordeau, being duly sworn, says:

I am an attorney associated with White & Case, attorneys for the defendant. I make this affidavit in opposition to plaintiff's motion to review the taxation of costs by the

Clerk of this Court on July 7, 1961. These costs were taxed in connection with a judgment entered in favor of defendant on a jury verdict from which plaintiff has not appealed.

The following outline of facts demonstrates that the bill of costs as taxed by the Clerk should be affirmed in all respects, except as noted on page 5 hereof with reference to the expenses of the witness Elias Faddoul.

[fol. 49] I. Costs of the First Trial

This case was tried twice. The first trial before Judge Palmieri in May 1959 lasted almost two weeks. After the jury failed to reach a verdict, Judge Palmieri dismissed the complaint for insufficiency on several legal grounds.

On October 27, 1959 defendant served a Notice of Taxation of a Bill of Costs and supporting affidavits (attached as Exhibit A) on plaintiff. On October 30, 1959 attorneys for both sides appeared before the Clerk of this Court and went over each item of the Bill of Costs. After thorough discussion, the Clerk allowed many of the items and disallowed others.

Plaintiff then made a motion to review the Taxation of Costs of the first trial by the Clerk. In support of this motion plaintiff submitted a lengthy affidavit. Defendant submitted affidavits in opposition. (Attached as exhibit B). Plaintiff submitted a reply affidavit. The motion was then exhaustively argued before Judge Palmieri who presided over the first trial. On December 10, 1959, Judge Palmieri rendered a decision granting the motion in part and denying it in part. A copy of his opinion and decision is attached as exhibit C.

Pursuant to this decision defendant submitted additional affidavits and exhibits and plaintiff submitted opposing affidavits. On February 9, 1960 Judge Palmieri rendered a second opinion and decision supplementing his earlier decision. (Copy attached as exhibit D).

After plaintiff appealed to the Court of Appeals with reference to the judgment dismissing the complaint and after that Court reversed the judgment and remanded this case for new trial, defendant moved to compel plaintiff to post a bond for security for costs. After a decision by

Judge Levet granting the motion and by Judge MacMahon dismissing the complaint for failure to post a bond, plain-
[fol. 50] tiff appealed to the Circuit Court. The Court of Appeals reversed the order of Judge MacMahon dismissing the action for failure to file the bond directed by Judge Levet and vacated the order requiring posting of a bond for costs. In speaking for the Court of Appeals, Judge Clark considered a number of factors pertaining to the propriety of dismissing the complaint for failure to post a security for costs. These included plaintiff's allegations that he did not have sufficient funds to post such a bond, that defendant had been dilatory in making an application for security for costs and that plaintiff had incurred expenses in the prosecution of this action. While it is true that Judge Clark stated *in dicta* that defendant had tried the case "expensively," the question of the propriety of the costs allowed by Judge Palmieri was not before the Court. The heavy expenses incurred by defendant in defense of this action were occasioned by the requirement on the part of defendant to meet a claim which the jury has found factually to be without foundation. The facts that were required to controvert the plaintiff's claim were required to be adduced by witnesses who were remote from the place of trial. It seems that the fact that this plaintiff has caused this defendant to incur such heavy expenses has no bearing on the taxability of the costs. No affidavits were presented to the Court of Appeals relating to the reasonableness or the necessity for the expenses allowed below as taxable costs. Such affidavits would have been irrelevant to the issue of whether plaintiff should post security for costs.

Plaintiff now seeks to reopen all of the questions which were argued before the Clerk of this Court and Judge Palmieri in connection with the taxing of costs of the first trial. Judge Palmieri who presided at the first trial is certainly the best qualified person for determining which of these costs were necessary to the defense of this action. For example, plaintiff seeks on this motion to challenge
[fol. 51] once again the transcript of certain pre-trial hearings. Whether these transcripts were necessary or not is a very difficult question for one who was not present at these

hearings and who does not know their scope. Judge Palmieri permitted these costs stating:

> "In view of the nature and extent of these conferences and the importance of the rulings which were entered, I am of the opinion that it was necessary to have a full record of the arguments, stipulations, and representations made by counsel."

This is merely an example of one of the many instances in which Judge Palmieri's first-hand knowledge of what transpired was invaluable to him in reviewing the taxation of costs of the first trial. Whether he erred in his rulings is a matter which should not be reviewed by another judge of this court.

For these reasons the Clerk of this Court was correct in awarding defendant the costs of the first trial as taxed by Judge Palmieri.

Eight pages of the affidavit submitted by plaintiff's attorney in support of the motion, pertain to the costs of the first trial.

II. Costs in Connection with the Second Trial

The following is an outline of the facts with reference to those items on the Bill of Costs to which plaintiff objects.

A. *Stenographers' fees for minutes of examination before trial of plaintiff on October 14, 1960* $138.75

This examination was conducted pursuant to an order of Judge Ryan. The purpose of this examination was to obtain relevant information with reference to plaintiff's [fol. 52] damages during the more than one year period since the first trial of this action. Plaintiff claimed damages of $160,000 (at the first trial he claimed approximately $60,000) which allegedly resulted from his wrongful discharge by defendant. To defend properly this claim of continuing damage it was necessary for defendant to explore thoroughly plaintiff's efforts to earn money.

B. *Expenses of witness Dr. Richard L. Meiling* $90.32

One of the crucial factual issues was whether plaintiff had conducted an operation under general anesthesia without having the results of a blood test and urinalysis. Defendant contended that such results were required not only by a specific rule of its hospital but were also required by commonly accepted standards of proper medical procedure. Further defendant contended that plaintiff was aware of this generally accepted standard. Plaintiff contended he was unaware of this. Dr. Meiling is Director of a Medical Center in Ohio where Dr. Farmer was a resident in ophthalmology. Dr. Meiling testified that results of such an examination were required by a standard rule of practice in the medical profession and that there was such a rule in that hospital at the time Dr. Farmer was resident there and that Dr. Farmer was required to receipt for a copy of this rule. As such, his testimony was important and necessary to the defense of this action. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Ohio to New York or that defendant paid it.

C. *Expenses of witness Elias Faddoul* $864.00

In the bill of costs taxed by the Clerk of this court on July 7, 1961 the expenses of Mr. Faddoul were given as $1,442.90. This was in accord with information which I [fol. 53] had received from our client in connection with expenses incurred. With respect to the motion made by plaintiff to review the bill of costs taxed by the Clerk of the court on July 7, 1961 I asked our client to verify that each expense had been paid by it. My attention has been called to the fact that the actual expense paid by defendant in connection with Mr. Faddoul's trip from Beirut, Lebanon to the United States on the second trial amounted to $864.00 as indicated by the affidavit of Mr. D. M. McLeod, Assistant Comptroller of defendant, whose affidavit is submitted herewith.

Mr. Faddoul was without any exaggeration the most important witness called by the defense. At the first trial of this action, plaintiff testified for the first time that he had

received the results of these laboratory examinations prior to performing this operation and that he had been given these results by Mr. Faddoul. At his examination before trial, plaintiff had stated that he had not had the results of these tests prior to the operation. At the second trial, plaintiff suggested that he *might* have received reports from Mr. Faddoul but wasn't certain. Witness Faddoul testified that he had not given plaintiff the results of these tests as plaintiff had claimed at the first trial. Mr. Faddoul was not employed by the defendant and was working in Beirut, Lebanon at the time of the second trial.

In my opinion as trial counsel, his presence in the courtroom was indispensable to the jury in determining who was telling the truth, Faddoul or plaintiff. In my opinion there was no substitute for the personal testimony of this vital witness on the central issue in this case. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Beirut, Lebanon to New York or that defendant paid it.

[fol. 54]

D. *Expenses of witness Dr. Frank Born* $1,735.50

Dr. Born was Assistant Medical Director of defendant at the time plaintiff was discharged and was present at the time plaintiff was discharged and witnessed the operation performed by plaintiff. He testified that at the time of his discharge Dr. Farmer admitted he had performed the operation without obtaining the laboratory work and did so, because he did not think it was necessary. (See p. 524 of the record.) This was highly relevant and important testimony for a jury to hear in order for them to make their determination of whether Dr. Farmer was truthful in stating that he had received the results of these tests prior to conducting this operation. Once again in my judgment as trial counsel, there was no substitute for the personal testimony of Dr. Born with reference to this most important admission with reference to the central issue of the case. If defendant had not called Dr. Born to testify, it would have subjected itself to a charge by the Court with reference to adverse inferences to be drawn from not call-

ing a witness under its control who possessed information bearing on a material issue. The importance of Dr. Born's testimony is apparent from the fact that plaintiff saw fit to conduct over 50 pages of cross-examination of Dr. Born. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Saudi Arabia to New York or that defendant paid it.

E. *Expenses of witness Marjorie Catherine Swanson, R. N.* $428.67

This witness was the anesthetist assigned to the operation performed by plaintiff. She testified that she told plaintiff that she would not act as anesthetist since the results of the laboratory tests had not been received. She [fol. 55] testified at that time she said this, Dr. Farmer proceeded to administer the anesthesia himself and made no comment that he had in fact already received the results of these tests. (See pp. 581-584 of the record.) Nurse Swanson was cross-examined at length by plaintiff. (See pp. 584-624 of the record.) Her personal presence was vital to a determination of the central factual issue before the jury. There is no dispute that the amount taxed includes the lowest cost first class round trip air passage from Washington to New York or that defendant paid it.

F. *Stenographers' fees of the minutes of this trial* $1,329.90

There were numerous direct factual contradictions in the testimony of the various witnesses in this action. The two major issues in this case were what the term of plaintiff's employment contract was and whether he was justifiably discharged. The term of plaintiff's contract was alleged by plaintiff to have been for as long as defendant maintained oil wells in Saudi Arabia. He testified that he was promised employment for this length of time in a conversation with defendant's employee. Each time plaintiff testified with reference to this promise his testimony varied. The exact phraseology of this promise was exceedingly important inasmuch as it was possible that the Statute of Frauds might have applied to it. The phrase-

ology was also important in connection with cross-examination of plaintiff in testing his credibility and memory. The exact words used by plaintiff as transcribed by the court reporter were thus indispensable. The second issue pertained to the reason for plaintiff's discharge. The vital issue in this connection was whether plaintiff in fact had received the results of the laboratory tests prior to commencing the operation. Plaintiff's testimony on different [fol. 56] occasions in this respect was directly contradictory. It was vitally important for plaintiff's exact words with reference to whether he had received these tests to be transcribed. It was important to have this record so that the jury could have the full and accurate facts upon which to come to a verdict. There were other factual issues raised which could be resolved only by having available the accurate record of the testimony. There were many factual questions to be resolved with respect to what transpired before the action was commenced without any additional disputes about what had been said at this trial. The only manner in which such disputes could be prevented or resolved was to have an accurate transcript of the trial. In my opinion the trial would have become extremely confused had such a transcript not been secured. The mere presence of such a transcript prevented such issues from arising.

Counsel for the defendant used this transcript constantly throughout the trial. It was referred to in the record and before the jury on at least six occasions by counsel. To the best of my recollection it was also referred to and used by the Court during the trial.

At the first trial of this action the following transpired:

"'Mr. Bordeau: He did not object.

"'Mr. Nulman [trial counsel at both trials]: I did object.

"'Mr. Bordeau: He did not object.

"'The Court: Let's get that right away. When did you put it in?

"'Mr. Bordeau: On the cross-examination of Dr. Farmer.

"'Mr. Nulman: I don't remember—I just—

"'The Court: You have just made a statement that he was permitted to do something over your objection.

[fol. 57] I am going to stop this right now. You have been making statements all along in this case that haven't been in accord with my recollection, and I want to stop it right now, if I can, by reference to the record.'" (reads record) (1249-1252)

In addition, at the first trial, the jury actually requested whole pages from the transcript of the testimony to assist them in their deliberations. At the first trial, they asked to see plaintiff's pre-trial testimony and trial testimony with reference to the receipt of the laboratory reports by plaintiff.

Defendant, therefore, had reason to anticipate similar confusion concerning the rulings of the Court and possible use of the transcript by the jury.

Under the circumstances, I believe it would have been derelict not to have obtained copies of this transcript as the second trial progressed. The cost of this transcript was necessarily obtained for use in this case.

For the above reasons, plaintiff's motion should be denied in all respects.

Chester Bordeau.

Sworn to before me this 11th day of December, 1961.

Corinne S. Hohfeler, Notary Public, State of New York, No. 52-1830200, Qual. in Suffolk Co., Certificate filed in New York County, Term Expires March 30, 1963.

[fol. 58]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF D. M. McLEOD, SWORN TO DECEMBER 11, 1961 IN OPPOSITION TO MOTION TO REVIEW TAXATION OF BILL OF COSTS

State of New York,
County of New York, ss.:

D. M. McLeod, being duly sworn, deposes and says

That he is an Assistant Comptroller of the Arabian American Oil Company, and as such is familiar with the

expenditures made by the Arabian American Oil Company in connection with the two trials of this action, the first having taken place before The Honorable Edward L. Palmieri, United States District Judge, on May 11, 1959 through May 21, 1959, and the second having taken place before The Honorable Edward Weinfeld, United States District Judge, on March 20, 1961 through March 29, 1961.

Your deponent has reviewed the Bill of Costs as taxed by the Clerk of this Court on July 7, 1961 in the amount of $11,900.12.

With the exception as hereinafter noted your deponent certifies that the items as they appear on the Bill of Costs were actually expended by the Arabian American Oil Company. Upon the review of this Bill of Costs as taxed by the Clerk on July 7, 1961 your deponent found that the first class air fare from Beirut, Lebanon to New York and return to Beirut, Lebanon is $1,442.90; however, in reviewing the records to be sure that each item as taxed was paid for by the Arabian American Oil Company, your deponent found that Mr. Faddoul travelled economy class, and that his round trip air fare from Beirut, Lebanon to New York and [fol. 59] return to Beirut, Lebanon was $864.00 which the Arabian American Oil Company paid.

D. M. McLeod.

Sworn to and subscribed before me this 11th day of December, 1961.

Delia H. Morgan, Notary Public.

Delia H. Morgan, State of New York, No. 313012-30, Qualified in New York County, Cert. filed in Queens County, Commission Expires March 30, 1962.

IN UNITED STATES DISTRICT COURT

Appearances:

William V. Homans, Esq., 122 East 42nd Street, New York, New York, Attorney for Plaintiff.

White & Case, Esqs., 14 Wall Street, New York, New York, Attorneys for Defendant.

Chester Bordeau, Esq., William D. Conwell, Esq., Of Counsel.

OPINION—September 11, 1962

EDWARD WEINFELD, D.J.

The plaintiff, who was unsuccessful in his action for breach of contract of employment, seeks to review the taxation of costs by the Clerk of the Court which have been allowed in the sum of $11,900.12.

[fol. 60] There have been two trials, each to a jury. The first resulted in a disagreement following which the Trial Judge granted the defendant's motion for a directed verdict as to which he had reserved decision, and thereupon judgment was entered in favor of the defendant.[1] Upon appeal this judgment was reversed and a new trial ordered.[2] Upon the second trial before this Court the jury returned a verdict in the defendant's favor.

Plaintiff, a physician who specialized in ophthalmology and practiced in Texas, alleged that he had been engaged by the defendant to head up the ophthalmology service of its hospital in Saudi Arabia for as long as the defendant continued to operate its oil wells there; that after he had entered upon the performance of his duties in Saudi Arabia, he had been wrongfully discharged. Although the issues presented by the plaintiff's claim were, as this Court instructed the jury, "comparatively simple,"[3] costs have

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[1] *Farmer* v. *Arabian Am. Oil Co.*, 176 F. Supp. 45 (S. D. N. Y. 1959).

[2] 277 F. 2d 46 (2d Cir.), cert. denied, 364 U. S. 824 (1960).

[3] These were: (1) was there an employment agreement as alleged by plaintiff; (2) did defendant's representative have authority to commit it thereto; and (3) if so, was plaintiff discharged for cause?

been taxed in the staggering sum of $11,900.12. The Court is persuaded that a substantial number of these costs, while they may well have been incurred in serving the convenience of the defendant and its attorneys, cannot be justified as necessary in resisting the plaintiff's claim.

Undoubtedly, parties to a litigation may fashion it according to their purse and indulge themselves and their attorneys, but they may not foist their extravagances upon their unsuccessful adversaries. To sanction such a policy may result not only in harassing a litigant, but may even deprive him of his day in court, particularly where, as in [fol. 61] the instant case, there is great disparity in the financial resources of the parties. Fear of imposition of astronomical costs should not be a deterrent against the assertion of legitimate disputes;[4] nor should one who in good faith brings an action be penalized because he has failed to carry his burden of persuasion.[5] While this defendant, as the Court of Appeals observed, " • • • with its rich resources may well wish to try the case expensively • • • "[6] it, as the successful litigant, is entitled to tax costs only in amounts specified in applicable statutes and, where not expressly specified, the allowable costs must not only be reasonable but necessary in resisting the plaintiff's claim.

Rule 54(d) of the Federal Rules of Civil Procedure, which provides that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs," vests discretion in the court in passing upon the necessity and the reasonableness of the costs.[7] The policy of the Federal Courts has been to keep litigation costs down—as particularly enunciated in Rule 1 of the Federal Rules of

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[4] *Emerson* v. *National Cylinder Gas Co.*, 147 F. Supp. 543, 545 (D. Mass. 1957), aff'd, 251 F. 2d 152 (1st Cir. 1958).

[5] See *Andresen* v. *Clear Ridge Aviation, Inc.*, 9 F. R. D. 50 (D. Neb. 1949). Cf. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), cert. denied, 338 U. S. 948 (1950).

[6] *Farmer* v. *Arabian Am. Oil Co.*, 285 F. 2d 720, 722 (2d Cir. 1960).

[7] *Harris* v. *Twentieth Century-Fox Film Corp.*, 139 F. 2d 571 (2d Cir. 1943).

Civil Procedure, " * * * to secure the just, speedy, and inexpensive determination of every action." The court's discretion should be exercised in conformity with that policy to avoid " * * * making the federal court a court only for rich litigants."[8]

[fol. 62] The plaintiff first challenges the allowance by the Clerk in a lump sum of $6,601.08, the full bill of costs as taxed after the first trial. Plaintiff seeks disallowance thereof upon the ground that the prevailing party is only entitled to tax costs of that trial in which he was ultimately successful. I do not agree. A prevailing party is entitled to tax all costs reasonably and necessarily incurred in either the prosecution or defense of a suit, and if more than one trial is required before a final result is achieved, the measure of taxable costs is not proscribed by that trial in which he finally prevailed.

Neither do I agree with the defendant's position that since the Presiding Judge at the first trial reviewed the taxation of costs, the plaintiff may not now challenge them. The reversal by the Court of Appeals of the first judgment in the defendant's favor necessarily resulted in the vacatur of the entire judgment including the costs which were a component part thereof. In fact, upon reversal of that judgment, the bill of costs which had been allowed upon review was formally vacated by an order entered in this Court. Accordingly, upon conclusion of the second trial the defendant as the prevailing party had the right to tax costs anew, whether claimed in connection with the first or second trial; and the plaintiff as the losing party equally had the right to have them reviewed *de novo*. Since the second trial was held before this Court it is in a position, against the background of both trials, to make a determination as to whether the various items were properly allowed by the Clerk either as mandated under statute or as reasonable and necessary.

Parenthetically, it should be noted that the Court of Appeals, in reversing an order directing the plaintiff herein to furnish security for costs, commented with respect to

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[8] *Farmer* v. *Arabian Am. Oil Co.*, 285 F. 2d 720, 722 (2d Cir. 1960).

travel expenses of witnesses, daily transcripts of the first trial and stenographic fees for pretrial hearings and examination of witnesses that there was no convincing showing [fol. 63] of their necessity.[9] While concededly the Court of Appeals' critical reference is *obiter dictum*, it is clear that it entertained serious doubt as to the allowance of those items.

The principal items attacked are transportation charges for bringing employees of the defendant or its former employees, either from Saudi Arabia or from distances within the United States beyond the subpoena power of the Court to testify at the trials. Three witnesses were brought here from Saudi Arabia for the first trial. One travelled on a private carrier and his transportation and expenses were taxed at $1,531.50. The other two witnesses travelled in the defendant's privately operated plane which had vacant seats to accommodate them. Although it was acknowledged there would have been unoccupied seats had the witnesses not been assigned to the flight, the defendant was allowed to tax their travel fare on the basis of a bookkeeping entry which allocated the cost of the seats in accordance with a computation of the yearly cost to the defendant in the operation of its airplanes. The stark fact remains that if the seats had not been used by the two witnesses, the defendant's annual expense for plane operation would have remained precisely the same. While the computation of the average cost per passenger may serve some statistical purpose of the defendant, it affords no justification for charging this theoretical figure to the plaintiff. At the second trial the defendant did not use its own plane but transported all three witnesses by commercial air line.

The basic issue remains—whether under all the circumstances it was necessary and reasonable to bring the witnesses from Saudi Arabia and other distant points to testify [fol. 64] at the trials. Concededly, it is preferable to have

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[9] *Farmer* v. *Arabian Am. Oil Co.*, 285 F. 2d 720 (2d Cir. 1960). This was an appeal by plaintiff from an order which dismissed his complaint for failure to post security for costs, which order was entered after the reversal by the Court of Appeals of the judgment dismissing the complaint for legal insufficiency.

"live witnesses" appear before the trier of the fact than to offer their testimony by way of deposition or interrogatories;[10] but countervailing considerations including the element of expense cannot be ignored. The cost of procuring the personal attendance of witnesses may be prohibitive or so burdensome or relatively disproportionate to the sums involved in the litigation as to require alternatives.[11] In the instant case the defendant had taken the plaintiff's pretrial deposition and so was aware of his contentions in support of his claim. It knew the witnesses it would rely upon to rebut his contentions. The testimony of any witness beyond the subpoena power of the Court could have been obtained by way of deposition, open commission, written interrogatories or letters rogatory. Upon an appropriate motion, the means of obtaining the testimony of the witness would have rested with the Court which, in its discretion, could have imposed conditions with respect to which party initially was to bear the expense and provided for its ultimate taxation in favor of the prevailing party.[12]

The defendant, instead of availing itself of pretrial procedures to obtain the testimony of such witnesses, decided to await the trial and to bring them here to testify in person. It was this decision which in large measure accounts for the huge bill of costs. Under all the circumstances the Court is of the view that these unusual expenses, entirely [fol. 65] disproportionate to the sum involved in this action, are unreasonable and should not be allowed.[13] In the exer-

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[10] *Bank of America* v. *Loew's Int'l Corp.*, 163 F. Supp. 924, 929 (S. D. N. Y. 1958). Cf. *Arnstern* v. *Porter*, 154 F. 2d 464, 469-70 (2d Cir. 1946); *Morrison Export Co.* v. *Goldstone*, 12 F. R. D. 258 (S. D. N. Y. 1952); *Lago Oil & Transport Co* v. *United States*, 97 F. Supp. 438 (S. D. N. Y. 1951); *Worth* v. *Trans World Films, Inc.*, 11 F. R. D. 197 (S. D. N. Y. 1951); *V. O. Machinoimport* v. *Clark Equipment Co.*, 11 F. R. D. 55 (S. D. N. Y. 1951).

[11] Cf. *Taejon Bristle Mfg. Co.* v. *Omnex Corp.*, 13 F. R. D. 448 (S. D. N. Y. 1953).

[12] Fed. R. Civ. P. 30(b). See *Branyan* v. *Koninklijke Luchtvaart Maatschappij*, 13 F. R. D. 425 (S. D. N. Y. 1953).

[13] Cf. *Taejon Bristle Mfg. Co.* v. *Omnex Corp.*, 13 F. R. D. 448 (S. D. N. Y. 1953).

cise of discretion, taxation of costs for those witnesses who appeared and testified at either trial will be limited to *per diem* fees for attendance and travel expenses not to exceed one hundred miles to and from the Court House. Thus, there is no occasion to deal with the question of whether in a proper case the Federal Rules of Civil Procedure[14] and the Judicial Code[15] authorize the taxation of transportation expenses of witnesses who travel to the place of trial more than one hundred miles or a further distance within the district.[16]

Another major item of expense is for daily transcripts of the minutes of both trials. This Court did not request the trial minutes. During the progress of the trial it made its own notes and abstract of the testimony of the various witnesses. There was nothing unusual or complicated about the issues presented under the pleadings. Undoubtedly it serves the convenience of counsel to have a witness' testimony as the trial proceeds, but absent a showing of necessity therefor, these may not be charged to an opposing side.[17] However much it might have made trial counsel's [fol. 66] labors, or even the Court's, easier to have the overnight transcripts, this does not establish that they are indispensable for proper cross examination as now urged. An entirely different situation is presented in the instance of a complicated and extended trial where lawyers are required to submit briefs and proposed findings.

The argument advanced that the jury requested the reading of portions of the testimony does not support the

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[14] Fed. R. Civ. P. 45(e), 54(d).

[15] 28 U. S. C. §§1821, 1920(3) (1958).

[16] *Compare Maresco* v. *Flota Merchante Grancolombiana*, 167 F. Supp. 845 (E. D. N. Y. 1958), *and Bank of America* v. *Loew's Int'l Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958), *with Spiritwood Grain Co.* v. *Northern Pac. Ry.*, 179 F. 2d 338, 344 (8th Cir. 1950), *Ryan* v. *Arabian Am. Oil Co.*, 18 F. R. D. 206 (S. D. N. Y. 1955) (dictum), *and Perlman* v. *Feldmann*, 116 F. Supp. 102, 115 (D. Conn. 1953). See also *Ludvigsen* v. *Commercial Stevedoring Co.*, 228 F. 2d 707 (2d Cir.), cert. denied, 350 U. S. 1014 (1956).

[17] 28 U. S. C. §1920(2) permits the taxation of "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."

defendant's claim for repayment for the daily transcript. It is fairly common experience that a jury during its deliberation asks that a particular witness' testimony be read; in such a situation the official court reporter reads from his original notes. Of course, if a transcript is available, the reporter may use it, but some courts have required that he always read from his original notes. There has been no showing to justify the charge for the transcript of the trials and they, too, are disallowed.

Another item for a stenographer's minutes points up the free and easy approach adopted by the defendant in incurring expense. In the first bill of costs an item allowed was for a verbatim transcription of counsel's oral argument on the defendant's pretrial motion for summary judgment. This Court, before whom the motion was argued, neither requested nor indicated that it was interested in obtaining a copy of counsel's oral argument. Yet the transcript thereof was ordered by defendant. This item, as well as other charges for minutes of legal arguments at various pretrial hearings on motions, are disallowed.[18]

The Court also disallows the cost for photostats of exhibits which were either received in evidence or marked for identification. The originals were available and produced in court and there is no showing of necessity for the photostats other than the convenience of counsel.

[fol. 67] With respect to the pretrial deposition of plaintiff, a question has arisen as to the rate per page charged. The taxation of this item shall not exceed the authorized rate per page for a single copy.[19]

In sum, the following are disallowed:

Items 2 (except minutes of 2/18/58 and 5/6/59 are allowed), 3, 4, 5, 6, 7, 10 and 12 contained in the first bill of costs, and I, IV(D), (E), (F), (H), (I) and (J) in the

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[18] Cf. *Perlman* v. *Feldmann*, 116 F. Supp. 102, 112 (D. Conn. 1953).

[19] Order of the United States District Court for the Southern District of New York dated December 27, 1948 and filed December 28, 1948, as amended by an order dated and filed April 7, 1958, based upon the recommendation of the Judicial Conference of the United States.

second bill of costs (except that mileage and expenses of witnesses at both trials are allowed as limited above).

Dated: New York, N. Y.
September 11, 1962.

Edward Weinfeld, United States District Judge.

[fol. 68]

IN UNITED STATES DISTRICT COURT

MEMORANDUM

EDWARD WEINFELD, D.J.

The attached communication, to which no reply has been received from defense counsel, is treated as an application for resettlement of the Court's order dated September 11, 1962.

Counsel is correct in that the Court intended to disallow the cost of the minutes for the hearing of 2/18/58, as the discussion on page 13 indicates. The Court intended to allow the cost of the minutes of the examination before trial of the plaintiff, including that of 10/8/56.

The order is modified to the extent of disallowing the cost of the minutes of 2/18/58, and allowing the cost of the minutes of 10/8/56 limited to authorized rates.

Dated: New York, N. Y.
September 28, 1962.

Edward Weinfeld, United States District Judge.

[fol. 69]

IN UNITED STATES DISTRICT COURT

STATEMENT SHOWING COSTS ALLOWED BY JUDGE WEINFELD

Statement showing corrected items on the bills of costs in the above-entitled action pursuant to Judge Weinfeld's rulings in opinion #28,134 filed September 11, 1962 and memorandum dated September 28, 1962:

Costs for witnesses who appeared and testified at either trial were limited to *per diem* fees for attendance and travel expenses not to exceed one hundred miles to and from the Court House. (Page 11, Opinion #28,134).

Costs for transcript of the trials disallowed. (Page 13, Opinion #28,134).

Costs for transcripts of arguments on motions disallowed. (Pages 13 & 14, Opinion #28,134).

Costs of photostats of exhibits disallowed. (Page 14, Opinion #28,134).

ITEMS AND AMOUNTS ALLOWED ON FIRST BILL OF COSTS.

1.	Attorneys' docket fee		$ 20.00
2.	Stenographers' fees for minutes of hearings and examinations before trial held on:		
	10-8-56—95 pages @ 65¢	$61.75	
	5-6-59—22 pages @ 65¢	14.30	76.05
	(Cost of pretrial deposition of plaintiff not to exceed authorized rate for single copy (page 14, Opinion #28,134).		
	ITEM 5—WITNESS FADDOUL:		
	2 days' attendance	$ 8.00	
	2 days' subsistence	16.00	
	200 miles @ 8¢/mile	16.00	40.00
	Sub-Total		$136.05
	Amount brought forward		$136.05
	ITEM 6—WITNESS PAGE:		
	8 days' attendance	$32.00	
	8 days' subsistence	64.00	
	200 miles @ 8¢/mile	16.00	$112.00
	ITEM 7—WITNESS SWANSON:		
	8 days' attendance	$32.00	
	8 days' subsistence	64.00	
	200 miles @ 8¢/mile	16.00	112.00

[fol. 70]

ITEM 10—WITNESS NEAL:		
2 days' attendance	$ 8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
ITEM 12—WITNESS MEILING:		
1 days' attendance	$ 4.00	
200 miles @ 8¢/mile	16.00	20.00
TOTAL COSTS, FIRST BILL OF COSTS, AS AMENDED		$420.05
ITEMS AND AMOUNTS ALLOWED ON SECOND BILL OF COSTS		
I—Amended amount, first bill of costs		$420.05
IV(D)—WITNESS MEILING:		
1 days' attendance	$ 4.00	
1 days' subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00
IV(E)—WITNESS NEAL:		
1 days' attendance	$ 4.00	
200 miles @ 8¢/mile	16.00	20.00
IV(F)—WITNESS FADDOUL:		
1 days' attendance	$ 4.00	
1 days' subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00
IV(H)—WITNESS BORN:		
3 days' attendance	$12.00	
3 days' subsistence	24.00	
200 miles @ 8¢/mile	16.00	52.00
IV(I)—WITNESS SWANSON:		
2 days' attendance	$ 8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
TOTAL COSTS, SECOND BILL OF COSTS, AS AMENDED		$588.05

[fol. 71]

IN UNITED STATES DISTRICT COURT

CORRECTED STATEMENT SHOWING ITEMS ALLOWED BY JUDGE WEINFELD

Corrected statement showing items of defendant's costs allowed and amended pursuant to Judge Weinfeld's rulings in Opinion #28,134 filed September 11, 1962 and memorandum dated September 28, 1962.

Costs for witnesses who appeared and testified at either trial were limited to per diem fees for attendance and travel expenses not to exceed one hundred miles to and from the Courthouse. (Page 11 of the opinion).

Costs for transcript of the trials disallowed. (Page 13 of the opinion).

Costs for transcripts of arguments on motions disallowed. (Pages 13 & 14 of the opinion).

Costs of photostats of exhibits disallowed. (Page 14 of the opinion).

ITEMS AND AMOUNTS ALLOWED ON FIRST BILL OF COSTS

1.	Attorneys' docket fee		$ 20.00
2.	Stenographers' fee for minutes of hearings and examinations before trial:		
	10-8-56—95 pages @ 65¢	$61.75	
	5-6-59—22 pages @ 65¢	14.30	76.05
3 & 4 disallowed in entirety.			
5.	WITNESS FADOUL:		
	2 days' attendance	$ 8.00	
	2 days' subsistence	16.00	
	200 miles @ 8¢/mile	16.00	40.00
6.	WITNESS PAGE:		
	8 days' attendance	$32.00	
	8 days' subsistence	64.00	
	200 miles @ 8¢/mile	16.00	112.00

[fol. 72]

7. WITNESS SWANSON:		
8 days' attendance	$32.00	
8 days' subsistence	64.00	
200 miles @ 8¢/mile	16.00	112.00
Amount carried forward		$360.05
Amount brought forward		$360.05
8. WITNESS BORN:		
6 days' attendance	$24.00	24.00
9. WITNESS LOHNAAS:		
4 days' attendance at trial	16.00	
1 days' attendance at court for deposition	4.00	
300 miles @ 8¢/mile (100 mile round trip on each of 3 days)	24.00	44.00
10. WITNESS NEAL:		
2 days' attendance	8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
11. WITNESS HEINZ:		
1 day's attendance	4.00	4.00
12. WITNESS MEILING:		
1 day's attendance	4.00	
200 miles @ 8¢/mile	16.00	20.00
13. WITNESS BINETTI:		
1 day's attendance	4.00	4.00
TOTAL COSTS, FIRST BILL OF COSTS, AS AMENDED		$496.05

ITEMS AND AMOUNTS ALLOWED ON SECOND BILL OF COSTS

I. Amended amount, first bill of costs		$496.05
II & III—Objections sustained at time of taxation.		
IV(A)—Objection sustained at time of taxation.		
IV(B)—Examination before trial of plaintiff, conducted by defendant on Oct. 14, 1960		138.75
IV(C)—WITNESS PAGE:		
2 days attendance		8.00
IV(D)—WITNESS MEILING:		
1 day's attendance	$ 4.00	
1 day's subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00

[fol. 73]

IV(E)—Witness Neal:		
1 day's attendance	$ 4.00	
200 miles @ 8¢/mile	16.00	20.00
IV(F)—Witness Fadoul:		
1 day's attendance	$ 4.00	
1 day's subsistence	8.00	
200 miles @ 8¢/mile	16.00	28.00
IV(G)—Witness Lohnas:		
1 day's attendance	$ 8.00	
160 miles @ 8¢/mile	12.80	20.80
Amount carried forward		$739.60
Amount brought forward		$739.60
IV(H)—Witness Born:		
3 days' attendance	$12.00	
3 days' subsistence	24.00	
200 miles @ 8¢/mile	16.00	52.00
IV(I)—Witness Swanson:		
2 days' attendance	$ 8.00	
2 days' subsistence	16.00	
200 miles @ 8¢/mile	16.00	40.00
IV(J)—Disallowed.		
Total Costs, 2nd Bill of Costs, as Amended		$831.60

Amount of $588.05 in judgment #64,313 corrected to show amount in sum of $831.60.

Herbert A. Charlson,
Clerk.

by: Gilbert E. Surdez
Deputy Clerk.

[fol. 74]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—October Term, 1962

Argued February 1, 1963.

Submitted to the *in banc* court March 18, 1963.

Docket No. 27893

HOWARD FARMER, Plaintiff-Appellee,

v.

ARABIAN AMERICAN OIL COMPANY, Defendant-Appellant.

Before: Lumbard, Chief Judge, Clark, Waterman, Moore, Friendly, Smith, Kaufman, Hays and Marshall, Circuit Judges.

Appeal by defendant from taxation of costs in its favor in civil action in the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, 31 F. R. D. 191. Affirmed in part and reversed in part.

Kalman I. Nulman, New York, N. Y. (William V. Homans, New York, N. Y., on the brief), for plaintiff-appellee.

[fol. 75] Chester Bordeau, New York, N. Y. (White & Case and William D. Conwell, New York, N. Y., on the brief), for defendant-appellant.

OPINION—November 6, 1963

LUMBARD, *Chief Judge* (with whom Judges MOORE, FRIENDLY, KAUFMAN and MARSHALL concur):

This appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district

and more than 100 miles distant from the place of trial. We hold that costs for such travel may be allowed and in the light of that holding we examine the rulings with respect thereto made by the district judges at the two trials of Farmer's suit for an alleged breach of his contract of employment.

Howard Farmer instituted this litigation on May 24, 1956, in the Supreme Court, New York County, against the Arabian American Oil Company (Aramco). Aramco removed the cause to the United States District Court for the Southern District of New York, there being diversity of citizenship. A trial was had before Judge Palmieri and a jury which terminated in a jury disagreement. Thereafter, Aramco's motion for a directed verdict was granted, 176 F. Supp. 45 (1959), but this determination we reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960), necessitating a second trial. Farmer failed to comply with an order directing him to post security for costs, and the action was dismissed. We again reversed, holding that the order constituted an abuse of discretion, as it effectively precluded the plaintiff from prosecuting his action because of the expense of procuring the bond, 285 F. 2d 720 (1960). A second jury trial, before Judge Weinfeld, resulted in a verdict for the defendant. The Clerk taxed costs of $11,900.12 which on Farmer's motion were reduced by Judge [fol. 76] Weinfeld to $831.60, and from this order Aramco appeals. After the appeal was heard by a panel consisting of Judges Lumbard, Smith and Hays, the active judges of this court agreed that the appeal should be considered *in banc*.

Some earlier decisions cast doubt on the appealability of a judgment solely for costs. See *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78 (1924); *The James McWilliams*, 49 F. 2d 1026 (2 Cir. 1931); *Walker* v. *Lee*, 71 F. 2d 622 (9 Cir. 1934). However, Rule 54(d) of the Federal Rules of Civil Procedure now governs the granting of costs. It states: "Except when an express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *." The effect of this pro-

vision, combined with 28 U. S. C. §1920,[1] is to make the right to statutory costs subject to judicial discretion. Within the careful statutory scheme, no hint of intent to create an element of uncontrolled discretion can be found, nor is one lightly to be implied. Furthermore, it is unquestionably true that the portion of the judgment relating to costs may be reviewed on appeal, for abuse of that discretion, if other issues are also raised. See, e.g., *Chemical Bank & Trust Co.* v. *Prudence-Bonds Corp.*, 207 F. 2d 67 (2 Cir. 1953), 347 U. S. 904 (1954); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7 Cir. 1949), cert. denied, 338 U. S. 948 (1950). We see no reason why we should not hear an appeal from this element alone. It is surely a final judgment within the meaning of 28 U. S. C. §1291. See *Donovan* v. *Jeffcott*, 147 F. 2d 198 (9 Cir. 1945). We hold that when, as here, the question is not whether the district [fol. 77] judge should have allowed or disallowed particular items of costs, but is rather whether he exceeded, and therefore abused, his discretion, a judgment solely for costs is appealable. *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (6 Cir. 1959); *Kemart Corp.* v. *Printing Arts Research Laboratories*, 232 F. 2d 897 (9 Cir. 1956); *Prudence-Bonds Corp.* v. *Prudence Realization Corp.*, 174 F. 2d 288 (2 Cir. 1949); *Harris* v. *Twentieth Century-Fox Film Corp.*, 139 F. 2d 571 (2 Cir. 1943); 6 Moore, Federal Practice 1309 (1953).

In taxing costs, the Clerk included substantial amounts for air transportation of defendant's witnesses from as far away as Saudi Arabia to the place of trial. Judge Weinfeld reduced these assessments to a uniform allowance of $16.00 per witness, or the equivalent of 100 miles each way at $.08 per mile. Judge Weinfeld took this action as an exercise of judicial discretion, choosing not to rely upon the 100-mile limitation frequently imposed by the federal courts on their own power to assess transportation costs of witnesses brought from without the judicial district in

[1] Section 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

(3) Fees and disbursements for printing and witnesses."

which the trial court is sitting. We must therefore first determine the applicability of the 100-mile limitation. We hold the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial.

The 100-mile rule appears to have evolved out of the limitation upon the subpoena power of a federal court to an area within the judicial district or 100 miles from the place of trial. See Federal Rules of Civil Procedure 45(e). There is not a shadow of a suggestion, however, in 28 U. S. C. §1920(3), which provides simply that "fees and disbursements for * * * witnesses" may be taxed as costs, that the court's power to issue a subpoena has anything whatever to do with what constitutes a recoverable disbursement for a witness. Indeed, 28 U. S. C. §1821 as amended in 1949 [fol. 78] provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar. Section 1821 expressly provides that *in lieu of* the usual mileage allowance, actual travel expenses shall be allowed to witnesses who are required to travel between "the Territories and possessions, or to and from the continental United States." The great bulk of judicial authority supporting the 100-mile rule is to be found in cases decided prior to the enactment of the 1949 amendment which added the above-quoted provision. *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347 (5 Cir. 1938). The vast majority of the more recent cases which approve the rule do no more than cite other cases, without considering the reasons which might lend support to it or weigh against it. Those cases decided subsequent to the 1949 legislation give it little or no attention. E.g., *Ludvigsen* v. *Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied, 350 U. S. 1014 (1956); *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied, 349 U. S. 952 (1955). Moreover, in some recent cases in the lower courts the 100-mile rule has been flatly rejected. *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959); *Maresco* v. *Flota Mercante*

Grancolombiana, S.A., 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958).

Whatever the merits of the prior judicial rule, the Congress has not given any compelling evidence demonstrating an intention that it be continued. The reason for the addition of an express provision for actual travel expenses in the case of overseas travel is stated in the letter of the Assistant to the Attorney General, appended to and made [fol. 79] part of the report of the Senate Committee discussing the 1949 bill: "For overseas travel, it is recommended that witnesses be allowed their actual expenses at the lowest first-class rate available. There have been times when witnesses have been required to engage in such travel at a personal financial sacrifice." S. Rep. No. 187, 81st Cong. 1st Sess., reprinted in 1949 U. S. Code Cong. Serv. 1231, 1233.

The 100-mile rule finds as little support in reason as it does in the statutes. Whether a witness comes into court voluntarily or under the compulsion of a subpoena, he comes at the behest of the party for whom he appears as a witness. Either way, he serves the interest of the court in arriving at a just determination of the controversy. See *United States* v. *Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (opinion by Mr. Justice Gray). The fact that a subpoena does not issue because the witness is outside the reach of the court has nothing to do with the problem of how to allocate the cost of his appearance at the trial.

Nor can the 100-mile rule be defended as an allocation of the expenses of litigation in keeping with the practice of our courts to let such expenses fall on the party who incurs them. Fees for legal services are usually the largest single expense of litigation. In most cases, the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further. Certainly there is no reason to extend it by the curious means of limiting the recovery of travel expenses to 100 miles, a figure which may bear no relation to the distance actually traveled. As this case well illustrates, a 100-mile limitation is an anachronism in a day when the facility of world-

wide travel and the development of international business makes the attendance at trial of witnesses from far off places almost a matter of course.

[fol. 80] It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection for the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which the losing party, in the interest of justice, should bear such costs. For example, had the positions in this case been reversed and Farmer been forced to produce witnesses from Saudi Arabia in order to defend against unjust charges of Aramco, one could hardly assert the justice of requiring Farmer to pay the costs of producing his witnesses himself, or risk the failure of his defense. Indeed, adherence to a rigid limitation on the taxation of travel expenses is more likely to work to the detriment of litigants with meager financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case.

There is no reason why a judge should be thought less capable of determining a proper allocation of the costs of witnesses' travel expenses than he is of allocating other expenses of trial, such as transcripts, which are committed without artificial limitation to the discretion of the trial judge. We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful [fol. 81] litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only

under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury.

Concluding that the 100-mile rule is inapplicable, we turn to the particular items of costs taxed in the case at bar. At the first trial, Judge Palmieri allowed travel expenses totalling $3,715.21 for transportation of six witnesses, three of whom came from Saudi Arabia. For reasons stated below, we think that, except as to the travel expenses of witnesses Page and Swanson, totalling $2,064.00, it was within the discretion of Judge Palmieri to allow these expenses, and that his exercise of discretion should not have been disturbed. As the judge who presided at the first trial, Judge Palmieri had the greater opportunity to assess the necessity of particular costs incurred in defense of the action before him. This circumstance, considered in the light of the sensitive nature of the problems presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial.

The plaintiff alleged that he had been hired to work as an ophthalmologist at the defendant's hospital in Saudi Arabia, and that he had been wrongfully discharged. In addition to disputing the terms of the employment contract, the defendant contended that the plaintiff had been discharged for just cause, specifically that he had performed an operation without first obtaining the results of certain tests, in violation of an express rule of the hospital and accepted standards of medical practice. The plaintiff's explanation for his discharge was that he had insisted upon truthfully reporting alleged findings that many American employees of the defendant in Saudi Arabia were contract- [fol. 82] ing trachoma, a tropical disease which leads to blindness. He claimed that his superiors had sought to intimidate him into suppressing his findings.

The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense. Judge Weinfeld

determined, however, that in view of the heavy expense of producing them in court, the defendant should have relied on written testimony taken in advance of trial or, at least, should itself bear the costs of the witnesses' appearance at trial. We cannot agree.

It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges. We have had occasion in the past to note the importance of "live" witnesses in a trial before a jury. See *Arnstein* v. *Porter*, 154 F. 2d 464, 469-70 (1946). Moreover, in the first instance it is for the judge before whom the trial is had to gauge the necessity for transporting witnesses to the place of trial and to determine the propriety of assessing costs for such transportation against the unsuccessful litigant. We believe Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial before him, just as we defer to him with respect to the costs of the trial at which he presided.

It appears, however, that two of the witnesses, Page and Swanson, occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed. [fol. 83] Judge Palmieri allowed costs of $361.55 for transcripts of pretrial hearings, examinations before trial, and depositions. Judge Weinfeld reduced this amount to $76.05. Considering the importance of pretrial hearings and the discovery procedure under the Federal Rules, we cannot say that it was an abuse of discretion for Judge Palmieri to conclude that these costs were necessary elements of preparation for the first trial, and then to allow them. Similarly, we find it within Judge Palmieri's discretion to allow $1,812.30 for stenographer's fees incurred in compilation of the daily minutes of trial, as well as $180.02 for photostatic copies of certain bulky exhibits, as he found both of these items necessary to the proper conduct of the trial. See 28 U. S. C. §§1920(2), 1920(4). We hold that it was an

abuse of discretion in view of Judge Palmieri's findings as to their necessity, for Judge Weinfeld to disallow them.

We sustain in its entirety Judge Weinfeld's determination as to the costs incurred in the trial held before him. Although there are those of us who would have allowed traveling expenses beyond the 100-mile limit had the trial been before us, we cannot say that Judge Weinfeld abused his discretion in limiting costs for transportation of witnesses to the second trial, held before him, to a uniform allowance of $16.00 per witness.

We therefore reverse and remand with instructions to allow the costs as taxed by Judge Palmieri on the first trial, $6,601.08, less $2,064.00 taxed for the travel of Page and Swanson, or a total of $4,537.08 for the first trial, plus those items taxed by Judge Weinfeld on the second trial.

SMITH, *Circuit Judge* (with whom CLARK and HAYS, *Circuit Judges,* join) dissenting:

I dissent, both from the determination that Judge Weinfeld abused his discretion in fixing costs and from the [fol. 84] holding that he had discretion to tax costs for travel over the "100-mile limit." As a matter of judgment the judge taxing costs might have made larger allowances for photostats and transcript on both trials, because of the seriousness of the charges and the importance of the outcome to the parties. But the issues were not extraordinarily complicated nor the trial one of great length, the judge had the benefit of observation of the proceedings directly before him, and I would not hold the judge's decision that much of the expense was not really necessary, error or his limitation of costs so flagrant an error as to constitute an abuse of discretion.

More important, however, to future litigants is the rejection of the limitation almost universally observed in the federal courts heretofore, of the taxation of travel expenses as costs where the travel is from a point without the district and more than 100 miles distant. This decision not only breaks with the overwhelming weight of authority, and creates a different rule for costs in civil cases from that in admiralty, but also, as the majority indeed appears to admit, abandons the traditional scheme of costs in American courts to turn in the direction of the English practice

of making the unsuccessful litigant pay his opponent's litigation expense as well as his own. It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means. Of course there are arguments for the English system, in its discouragement of much litigation, but it is strange to find this court taking this time and opportunity to espouse it in the face of the contrary choice of the Supreme Court when the identical question of taxation of travel expense was before it in the formulation of the Admiralty Rules. I fear that the majority reads into the statute and rule [fol. 85] concerning reimbursement of witnesses and costs a direction as to where the ultimate burden of litigation expense must fall which just isn't there.

In reducing the allowance to the equivalent of mileage for 100 miles each way at 8¢ a mile, Judge Weinfeld did not rely on the limitation referred to which has heretofore been imposed by the courts on the power to assess mileage outside the district and more than 100 miles, but rather took the action as an exercise of discretion. We should consider, however, whether his ruling should be affirmed on the basis of the 100-mile limitation. I would hold that it should be so affirmed. Even though it is now accepted that a witness need not be under subpoena to collect his statutory fees and make the losing party liable for them as costs, it will be noted that most courts that have considered the question have imported the territorial limitation on the subpoena of witnesses[2] (within the district or

[2] Rule 45(e) of the Federal Rules of Civil Procedure.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides

100 miles from the place of trial) to limit the distance for which mileage fees can be taxed as costs. *Ludvigsen* v. *Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied 350 U. S. 1014 (1956); *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Spiritwood Grain Co.* v. *Northern Pac. Ry.*, [fol. 86] 179 F. 2d 338 (8 Cir. 1950) (dictum); *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347 (5 Cir. 1948); *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied 349 U. S. 942 (1955); *Kenyon* v. *Automatic Instrument Co.*, 10 F. R. D. 248 (W. D. Mich. 1950); *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259 (W. D. Mo. 1951), modified on another ground, 194 F. 2d 846 (8 Cir.), cert. denied 343 U. S. 942 (1952); *Barnhart* v. *Jones*, 9 F. R. D. 423 (S. D. W. Va. 1949); *Gallagher* v. *Union Pac. Ry.*, 7 F. R. D. 208 (S. D. N. Y. 1947); *Anonymous*, 1 Fed. Cas. 992 (C. C. S. D. N. Y. 1863); *Beckwith* v. *Easton*, 3 Fed. Cas. 29 (D. C. E. D. N. Y. 1870); *The Leo*, 15 Fed. Cas. 326 (D. C. E. D. N. Y. 1872); *Buffalo Ins. Co.* v. *Providence & Stonington S.S. Co.*, 29 Fed. 237 (C. C. S. D. N. Y. 1886); *The Vernon*, 36 Fed. 113 (D. C. E. D. Mich. 1888); *The Syracuse*, 36 Fed. 830 (C. C. S. D. N. Y. 1888); *Kirby* v. *United States*, 273 Fed. 391 (9 Cir. 1921), aff'd 260 U. S. 423. (The affirmance does not mention the problem); *Consolidated Fisheries* v. *Fairbanks, Morse & Co.*, 106 F. Supp. 714 (E. D. Pa. 1952); *Lee* v. *Pennsylvania R.R. Co.*, 93 F. Supp. 309 (E. D. Pa. 1952); *Commerce Oil Refining Co.* v. *Miner*, 198 F. Supp. 895 (D. R. I. 1961); *Reynolds Metals Co.* v. *Yturbide*, 258 F. 2d 321 (9 Cir. 1958), cert. denied 358 U. S. 840. Besides this authority, Moore approves the rule, although without discussion or analysis. 6 Moore, Federal Practice, pp. 1362-63. Contra, *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24

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therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. §1783.

F. R. D. 200 (S. D. N. Y. 1959); *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958); *Knox* v. *Anderson*, 163 F. Supp. 822 (D. Hawaii 1958). Besides *United States* v. *Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (Gray, *J.*) which [fol. 87] rejects the 100 mile rule, there is other authority to the same effect from Massachusetts. See *Prouty* v. *Draper*, 20 Fed. Cas. 13 (C. C. D. Mass. 1842) (Story, *J.*). The First Circuit, however, cannot really be taken as having this position today. *The Governor Ames*, 187 Fed. 40, 50 (1 Cir. 1910) states the rule which had been followed in the District of Massachusetts but criticizes it. The District Court in *Commerce Oil Co.* v. *Miner*, *supra*, felt itself not bound by the old cases and went on to follow the great weight of authority.[3]

The sole remaining support for the rejection of the 100-mile limitation, therefore, would seem to be the District Court cases in the Southern and Eastern Districts of New York, and the single case from the District of Hawaii. With all deference, I feel that the rejection of the rule advocated by these few cases and carried out by our brethren in this case is based on an erroneous reading of the proviso added in 1949 to 28 U. S. C. §1821. The legislative history of the proviso, 1949 U. S. Code Cong. Service, pp. 1231-3, discloses only a concern for the inadequacy of

[3] From opinion by Judge Day, 198 F. Supp. 895, 899:

"In the absence of any authoritative holding by the Court of Appeals for the First Circuit, I am constrained to follow the reasoning and logic of the rule prevailing in the majority of the federal courts. This rule imposes no undue hardships on a litigant, in view of the liberal provisions of Rule 26 of the Federal Rules of Civil Procedure for the taking of the depositions of persons living outside the district where a case is pending, and for their use at the trial of such case. In the event a litigant feels that the testimony of a witness in person is essential, it is only right and proper that such litigant should bear the excess in cost incident to his personal appearance before the trial court. Accordingly, the allowance for mileage for witnesses residing outside this district shall be limited to 100 miles each way."

compensation to witnesses, as to rate per diem and mileage, and inadequacy in cases where mileage was below first class fare, with no discussion whatever by the Committee or the Assistant to the Attorney General of the eventual recovery [fol. 88] of the fees as costs by the prevailing party. It was necessary to obtain authority to pay the expenses of such witnesses at the lowest first class rate so that their attendance could be obtained without financial sacrifice on their part. It is noteworthy that the request came from the Department of Justice and not from the Administrative Office, and that it applies to witnesses in criminal as well as civil and admiralty causes. It is impossible to tell from the language of the statute itself whether the 100-mile rule was within the contemplation of the Congress at the time. Yet some indication of a lack of any purpose to affect the rule may be drawn from the title of the Act which added the proviso, "An Act to increase the fees of witnesses in the United States Courts and before United States Commissioners, and for other purposes" with no mention of any effect on taxable costs. It is hard to believe that the Assistant to the Attorney General was unfamiliar with the 100-mile rule in the light of the volume of government civil and admiralty litigation. This is particularly so in the light of the existence of Admiralty Rule 47,[4] by which the Supreme Court, as early as 1920, recognized and enforced the 100-mile rule. The Supreme Court's power over costs in admiralty was confirmed in the 1948 revision of Title 28, §1925, without any reference to Rule 47. It seems quite anomalous to argue that the Congress which in 1948 confirmed the power of the Supreme Court over costs in admiralty in the face of existing Rule 47 applying the 100-mile travel costs limit, indirectly rejected it a year later by a statute not limited to civil cases.

In the interest of precise statement, I would adopt the formulation of the Ninth Circuit: "Mileage allowable [fol. 89] should be that which was traveled *within* the dis-

[4] Admiralty Rule 47. Costs—travel of witnesses

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.

trict, *or* actual mileage traveled in and out of the district up to 100 miles, whichever is the greater." *Kemart Corp. v. Printing Arts Research Laboratories, Inc., supra* at 904 (emphasis in original). The point is of more than formal interest in a circuit whose districts include some with distances of more than 100 miles from a seat of court. See *Hayden* v. *Chalfant Press, Inc.*, 281 F. 2d 543 (9 Cir. 1960).

Imposition of this limitation on costs is more in keeping with a fundamental choice in our legal system than allowing an unlimited reimbursement would be. Unlike some other countries we have always left the major portion of the expense of litigation to fall ultimately upon the party who bears it in the first instance. Recovery of attorney's fees and major expenses of preparation for trial is with us the exception rather than the rule. If perhaps, the victor in a just cause is not made entirely whole, the doors of our courts are not closed to the small litigant who cannot risk being ruined by the imposition of his adversary's full expenses. The witness, of course, still recovers his full statutory fees under 28 U. S. C. §1821. The effect of the existing rule is to divide this burden between the party summoning him and the party liable for the statutory costs, with the party who chooses to summon him bearing the larger portion of the costs when extensive travel is chosen in place of testimony by deposition or letters rogatory. I submit that this result will best promote the fair administration of justice in the district courts.[5]

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[5] Judge Moore's language in *Barnhart* v. *Jones, supra*, is often quoted:

> "• • • The *effect* of a subpoena served outside the district is limited to 100 miles from the place of trial, and it seems only reasonable to infer that Congress must have intended to limit the taxation of mileage to the same distance. If a court in a country as vast as ours permitted taxation of the entire mileage of witnesses without limitation as to distance, an unbearable burden would be imposed upon the conduct of litigation. Such a course might in some cases lead to a result whereby costs would be greater than the amount of the recovery.
>
> "Economy in litigation is an essential element of justice. Taxation of unlimited mileage allowances is in derogation of this principle, and cannot be permitted."

[fol. 90] Judge Weinfeld was therefore correct in result in limiting the travel expense allowed as costs to each witness from without the district to $16.00—8¢ a mile for 100 miles each way for each trial.

Turning now to his rulings on other items we must determine whether there was an abuse of discretion in his disallowance of any of those taxed by the Clerk. At the outset we are faced with the fact that the judgment after the jury disagreement on the first trial was vacated by the reversal on appeal, so that Judge Palmieri's findings as to the necessity and reasonableness of such items as transcript and photostatic copies of portions of exhibits for use at the trial were not binding on Judge Weinfeld in reviewing costs at the time of final judgment. These are matters in which, however, it would seem that great deference should be given by the second judge to the opportunity of the first judge, here Judge Palmieri, to weigh the situation then before him in assessing necessity. The second judge does, however, have an advantage of the additional developments before him subsequent to the first trial, which he may take into consideration. In the light of this, although the writer would as an original matter have been inclined to make the allowance made by Judge Palmieri, at least as to the necessity of photostats[6] and transcripts of pretrial depositions and perhaps also as to the necessity of daily transcript,[7] there is surely ground for difference of [fol. 91] opinion as to the necessity of photostats and transcript, let alone daily copy, in a trial of these rather simple, though hard fought, issues. It was therefore not an abuse of discretion to disallow the items, and as pointed out by the majority, our review of these items is not to determine whether the findings of Judge Weinfeld as to necessity and reasonableness are correct, but whether they are so grossly in error as to constitute an abuse of judicial discretion.

I would affirm the judgment for costs of $831.60.

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[6] Compare *Galion Iron Works & Mfg. Co.* v. *Beckwith Machinery Co.*, 25 F. Supp. 591 (W. D. Pa. 1938) with *Raffold Process Corp.* v. *Castanea Paper Co.*, 25 F. Supp. 593 (W. D. Pa. 1938).

[7] See *Bank of America* v. *Loew's International Corp.*, *supra*; *Perlman* v. *Feldmann*, *supra*.

CLARK, *Circuit Judge* (concurring in the dissent of Judge SMITH):

I concur completely in Judge Smith's dissent, expressing, as it does, a wise public policy, buttressed by the overwhelming weight of authority and by long settled federal practice. But I venture a brief additional statement because of the great practical importance of the issue and because the ambiguities and policy conflicts of the majority opinion will require a re-evaluation of the problem either judicially or by rule-makers or legislators. The problem may be made concrete by considering the difficulties hereafter facing district court clerks and judges. Up to now—as shown by inquiry, as well as by the long list of precedents—the clerks have applied the 100-mile limitation on travel of witnesses routinely and substantially without dispute. Now they are faced with two opposing policy approaches and will not be able to act when the issue arises without a full-dress hearing and a court review.

In its attempt to straddle the division of policy disclosed below, the majority decision has all the earmarks of a compromise result. There is nothing inherently wrong in this; at times a compromise among views may be quite desirable. But care must be taken that it does not lead to illogical or conflicting results. Here in practical consequence we [fol. 92] have lavish travel fees allowed on the round of litigation which the defendant lost, and denied on the round it won. The difficulty arises because the decision departs from the wise normal rule that one judge alone is responsible for the ultimate decision of a cause on trial and that this responsibility is not to be shared with or apportioned among those who have made preliminary or interlocutory rulings. As a matter of fact the decision does great injustice to the first judge here, because it holds him to rulings made at a preliminary stage, before much that is relevant had happened, and does not give him an opportunity to review and revise his actions in the light of later events. I regard the responsibility as centered in Judge Weinfeld; but if, contrary to this, we force him to divide it with Judge Palmieri, we should at least have given the latter the op-

portunity to review his holdings in the light of the full record.

Again it appears that the majority have lacked final courage to reach a completely hard-boiled result, as of course is shown by their reduction of the quite outrageous sum claimed of $11,900.12 (composed mainly of the cost of defendant's bringing its own employees around the world) to $4,537.08, plus the cost allowed of the second trial, apparently $335.55. This sum, totaling nearly $5,000, is not an inconsiderable item; but ironically that required some questionable rulings to reach it. Thus the expenses of witnesses Page and Swanson, totaling $2,064, were disallowed because they occupied otherwise unused space on a company plane. Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees.

[fol. 93] There are other factors which, to me, point also to the injustice of the result. At an early stage of the case, we very pointedly criticized lavish travel expenditures in reversing an order for a bond for costs which plaintiff was unable to furnish. *Farmer* v. *Arabian American Oil Co.*, 2 Cir., 285 F. 2d 720. When the defendant persisted, it would seem that the extra expenditures should have been at its own risk and from its own treasury. The majority are surely ill-advised in trying to claim support from the supposed equities; at best shifting sands, here these obviously favor the plaintiff as much as the defendant.[1] Nor is the supposed need of oral testimony an adequate excuse; the jury, in my judgment, is not so stupid as to need to see

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[1] Thus the defendant's defense of its discharge of the plaintiff was an attack on the latter's professional competence, calling forth as bitter emotions as did the plaintiff's attack on defendant's hospital conditions. And there seems to have been a great deal of evidence not closely relevant involving plaintiff's marital, litigious, and emotional instability. It should be recalled that it took two juries to settle the plaintiff's fate; the first jury disagreed.

the defendant's employees in person to decide where the truth lies. And in the federal system we have provided ample means of securing testimony through depositions and interrogatories, making it reasonable, natural, and practical to limit repayment of travel costs to those only who can be required to come to court by exercise of the court's subpoena power. Indeed, heretofore we have taken the position that a party's preference for oral testimony must be weighed against the burden to his opponent, and an order for depositions or interrogatories must be substituted when travel costs will be burdensome. *Hyam* v. *American Export Lines*, 2 Cir., 213 F. 2d 221, 222-223 (per Harlan, *J.*); *Richmond* v. *Brooks*, 2 Cir., 227 F. 2d 490, 492. Nor is the claim at all realistic that these large allowances may at times favor the impecunious litigant. Such a liti- [fol. 94] gant will not have the cash to advance originally; nor can he take the chance of being saddled with the cost ultimately. As Judge Smith so well demonstrates, this argument represents an approach to the English system, never accepted by us because of our conviction that it "favored the wealthy and unduly penalized the losing party."[2] Here the bill of costs, obviously ruinous to a plaintiff who could not afford a cost bond, can mean little more than an instrument of revenge to this great corporation. I submit that it is not wise policy, or consistent with our traditions, to put the decision of the lavishness of the trial for all practical purposes in the hands of the winning litigant.

Judge Smith gives a fair indication of the strength of the precedents for this traditional view, including the Supreme Court's Admiralty Rule 47, although he does not exhaust the available number.[3] With the recent cases repudiating the few earlier cases contra in the First Circuit, see *Commerce Oil Refining Corp.* v. *Miner*, D. C. R. I., 198 F. Supp. 895, the majority decision is supported only by certain district court decisions here which do not repre-

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[2] *Conte* v. *Flota Mercante del Estado*, 2 Cir., 277 F. 2d 664, 672, per Friendly, *J.*, citing Goodhart, *Costs*, 38 Yale L. J. 849, 872-877 (1929).

[3] See, e.g., Annotation 4 to 28 U. S. C. §1821.

sent the law of our Circuit.[4] And neither statute nor rule [fol. 95] defines of what these court costs shall consist.[5] As Judge Smith demonstrates, the decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history.[6] The result reached below, D. C. S. D. N. Y., 31 F. R. D. 191, 197, of $831.60—a not insubstantial sum in itself—is thus based upon strong precedent and long continued, substantially unbroken custom. It is fair and just. It should have been sustained here.

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[4] *Bank of America* v. *Loew's International Corp.*, D. C. S. D. N. Y., 163 F. Supp. 924, per Dawson, *J.*; *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, D. C. S. D. N. Y., 24 F. R. D. 200, per Dawson, *J.*; *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, D. C. E. D. N. Y., 167 F. Supp. 845, per Byers, *J.* The case of *Knox* v. *Anderson*, D. C. Hawaii, 163 F. Supp. 822, rests on a special statutory provision. See note 6 *infra*. Against these may be cited such important Second Circuit cases as *Perlman* v. *Feldmann*, D. C. Conn., 116 F. Supp. 102, 115, per Hincks, *J.*; *Gallagher* v. *Union Pac. R. Co.*, D. C. S. D. N. Y., 7 F. R. D. 208, per Caffey, *J.*; *Ryan* v. *Arabian Am. Oil Co.*, D. C. S. D. N. Y., 18 F. R. D. 206, 208, per Bondy, *J.*; and other earlier cases cited by Judge Smith.

[5] Thus F. R. 54(d) does not define costs, but leaves their fixing to statute or decisional law. And 28 U. S. C. §1920 defines certain costs such as the fees of the clerk and marshal, but is pointedly unspecific in its subd. (3) covering "Fees and disbursements for printing and witnesses."

[6] This proviso, 63 Stat. 65, to the standard mileage allowance statute, 28 U. S. C. §1821, allowing actual travel expenses to witnesses "attending in any court of the United States * * * who are required to travel between the Territories and possessions, or to and from the continental United States," was obviously passed with no intent to change the long standing federal practice, as Judge Smith demonstrates. Moreover, its wording does not bear the burden attempted to be put upon it, for by its terms it covers travel only between the place of trial and the places listed in the statute which do not include foreign countries. And the comment from the Assistant to the Attorney General adds nothing; the reference to "overseas travel" is to travel to or from the Territories and possessions. The only case on the proviso, *Knox* v. *Anderson*, D. C. Hawaii, 163 F. Supp. 822, involving travel between California and Hawaii (i.e., within its exact terms) expressed some reluctance to construing it as without the usual federal rule.

WATERMAN, *Circuit Judge* (in separate statement):

I dissent from the result reached by the majority of the court and agree with my brothers Clark, Smith and Hays that the judgment for costs of $831.60 should be affirmed.

I hold a somewhat different view from my colleagues and therefore submit this separate statement. It is my belief that Judge Weinfeld properly treated the motion before him as a motion addressed to his discretion and that he properly exercised his discretion in his disposition of that [fol. 96] motion. I differ from the position taken in the opinions of the dissenters relative to the power Judge Weinfeld could exercise over the major items of dispute between the parties—the items relating to the proper taxation of transportation expenses of certain of the prevailing party's witnesses who were not subpoenaed. See Judge Weinfeld's discussion at 31 F. R. D. 191, 195-196.

When a motion to review the taxation of witness costs is presented to a district judge he surely should have in mind the rule my three dissenting brothers would inflexibly apply—the rule that recoverable witness mileage should be limited as of course to travel within the district, or, in the event of travel outside the district, to 100 miles of the place of hearing. Nevertheless, such a motion is a proper one to make, and the only purpose of the motion is to have the judge's independent judgment exercised. It is obvious that Judge Weinfeld did have this long-standing rule in mind when he so properly held that the costs movant requested should not be allowed.

I would lay down a rule that, in the taxation of costs "as of course to the prevailing party" by the clerks of our district courts, the so-called "one hundred mile rule" must be followed in the first instance, but I would not take away from a district judge the power to modify that taxation if motion be made to the judge so to do. There is always the rare case—which neither Judge Weinfeld nor I would find this case to be—where taxation inflexibility can work scandalous injustice.

[fol. 97]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

HOWARD FARMER, Plaintiff-Appellant,

v.

ARABIAN AMERICAN OIL COMPANY, Defendant-Appellant.

JUDGMENT—November 6, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U. S. D. J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the defendant-appellant.

A. Daniel Fusaro, Clerk.

[fol. 98] [File endorsement omitted]

[fol. 99] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 100]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 111-1103

HOWARD FARMER, Plaintiff,

—against—

ARABIAN AMERICAN OIL COMPANY
(a Delaware corporation), Defendant.

ORDER ON MANDATE—December 18, 1963

Defendant having appealed from the orders of the Honorable Edward Weinfeld, United States District Judge, entered on September 11, 1962, and September 28, 1962, which disallowed items of costs taxed in favor of defendant by the Clerk of the United States District Court for the Southern District of New York on July 7, 1962, and said appeal having been heard by the United States Court of Appeals for the Second Circuit and said Court of Appeals having entered its judgment, dated November 6, 1963, providing:

> "Appeal from the United States District Court for the Southern District of New York and was argued by counsel.
>
> On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U.S.D.J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the appellant."

and the mandate of the United States Court of Appeals for the Second Circuit, which includes the judgment, bill of costs and opinion of said court, having been received and filed in this court,

[fol. 101] Now, on motion of White & Case, attorneys for defendant, it is hereby,

Ordered, Adjudged and Decreed, that the aforesaid judgment of the United States Court of Appeals for the Second Circuit be and the same hereby is made the order and judgment of this court; and it is further

Ordered, Adjudged and Decreed, that the following costs are allowed:

(a) The costs as taxed by the Honorable Edmund L. Palmieri by orders made by him on December 10, 1959, and February 9, 1960, in the sum of $6,601.08, less the sum of $2,064.00, the amount allowed by the Honorable Edmund L. Palmieri for the travel for Dr. Robert C. Page and Marjorie Catherine Swanson, and disallowed by the Court of Appeals, or a total of $4,537.08; and

(b) The sum of $335.55, the total of those items of costs allowed by the Honorable Edmund L. Palmieri by his orders dated September 11; 1962, and September 28, 1962,

making a total of $4,872.63; and it is further

Ordered, Adjudged and Decreed, that defendant, Arabian American Oil Company, 505 Park Avenue, New York, New York, recover of plaintiff, Howard Farmer, c/o William V. Homans, Esq., 122 East 42nd Street, New York, New York, the sum of $4,872.63, and the sum of $766.50, [fol. 102] the costs allowed and taxed in the United States Court of Appeals, or a grand total of $5,639.13, and that said defendant have execution therefor.

Edward Weinfeld, U. S. D. J.

[Stamp—Rec'd in Clerk's Office 12/19/63—J.A.M.]

Dated: New York, New York
December 18th, 1963

Judgment Entered This 19th day of December, 1963.
James E. Valeche, Clerk.

[File endorsement omitted]

[fol. 103]

SUPREME COURT OF THE UNITED STATES

No. 804—October Term, 1963

HOWARD FARMER, Petitioner,

vs.

ARABIAN AMERICAN OIL COMPANY.

ORDER ALLOWING CERTIORARI—March 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 808 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 104]

SUPREME COURT OF THE UNITED STATES

No. 808—October Term, 1963

ARABIAN AMERICAN OIL COMPANY, Petitioner,

vs.

HOWARD FARMER.

ORDER ALLOWING CERTIORARI—March 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 804 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. [redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HOWARD FARMER,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

KALMAN I. NULMAN,
Counsel for Petitioner,
60 East 42 Street,
New York 17, New York.

KALMAN I. NULMAN,
WILLIAM V. HOMANS,
Of Counsel.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

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No.

HOWARD FARMER,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Howard Farmer, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 6, 1963.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 59a) is reported at 31 F. R. D. 191. The opinions of the Court of Appeals (*infra* Appendix A, pp. A-1—A-23) (*Farmer v. Arabian American Oil Co.*, 324 F. 2d 359).

Jurisdiction.

The judgment of the Court of Appeals (Appendix B, pp. B-1 to B-2), was entered on November 6, 1963. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. §1254(1).

Questions Presented.

1. Whether Congress intended by its 1949 amendment to 28 U. S. C. §1821 to reject the 100 mile travel limitation rule for civil cases and create a different rule of costs in civil cases from that in admiralty and to abandon the traditional scheme of costs in American Courts which requires each party to pay his own litigation expenses.

2. Whether Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920 change the established rule forbidding appeals from decrees for costs alone when the power of the court to assess costs against either party is not in dispute and only the mere amount to be fixed is in issue.

3. Whether and to what extent a District Judge is bound to follow the views expressed by other judges on interlocutory or other rulings in exercising his discretion in determining the question of costs.

Statutes Involved.

The statutory provisions involved are 28 U. S. C. §1821, Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920. They are printed in Appendix C, *infra*, pp. C-1 to C-2.

Statement.

Petitioner, a medical doctor, instituted this action to recover $4,000[1] damages for wrongful discharge in the Supreme Court, New York County. Respondent removed the cause to the United States District Court for the Southern District of New York on the ground of diversity of citizenship.

A trial before United States District Judge Palmieri and a jury resulted in a jury disagreement followed by a directed verdict of dismissal of petitioner's complaint, 176 F. Supp. 45 (1959) and the entry of a judgment for costs against petitioner in the sum of $6,601.08.

On appeal to the United States Court of Appeals for the Second Circuit, that court reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960).

Thereafter respondent sought and was granted an order directing petitioner to post security for costs in the sum of $6,000. Upon petitioner's failure to comply with such order his action was dismissed. The Court of Appeals for the Second Circuit again reversed, 285 F. 2d 720 (1960) holding that the order constituted an abuse of discretion as it effectively precluded petitioner from prosecuting his action because of the expense of procuring the bond.

A second jury trial before United States District Judge Weinfeld resulted in a verdict for defendant. The clerk taxed costs of $11,900.12 which were on petitioner's motion reduced by Judge Weinfeld, in the exercise of his discretion, to $831.61.

On appeal by respondent on the sole issue of the amount of the costs to a panel of the United States Court of Appeals for the Second Circuit consisting of Chief Judge

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[1] Later twice amended on respondent's demand to reflect estimated total damages.

Lumbard and Judges Smith and Hays, the active judges of that court on their own motion agreed that the appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district and more than 100 miles distant from the place of trial, and that the appeal should be considered *en banc*.

The Court below divided on the question, Chief Judge Lumbard (with whom Judges Moore, Friendly, Kaufman and Marshall concur) refusing to follow what the late Judge Clark describes in his separate dissent as "a wise public policy buttressed by the overwhelming weight of authority and by long settled federal practice" because of the expressed belief (i) that the 100-mile limitation is an anachronism which Congress had not, by its 1949 amendment to 28 U. S. C. §1821, given any compelling evidence of an intention that it be continued; (ii) that the decisions of the other Courts of Appeals upholding the 100-mile rule were either decided prior to the 1949 amendment or, where decided thereafter, the "vast majority" do no more than cite other cases; and (iii) there is no reason to extend the practice of letting trial expenses fall on the party who incurs them beyond the cost of fees for legal services.

Judge Smith (with whom the late Judge Clark and Judge Hays concur) dissents and states that the majority decision not only is contrary to the overwhelming weight of authority and decisions of the other Courts of Appeals but that it creates a different rule for costs in civil cases from that in admiralty and, more important, it abandons the traditional scheme of costs in American courts to turn in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own.

The late Judge Clark concurs in the dissent of Judge Smith and, in a separate opinion, reiterates the point that the weight of authority favors the traditional view upholding the 100 mile limitation and asserts that the majority decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history.

Judge Waterman dissents in a separate statement from the result reached by the majority. He would affirm the judgment on appeal and would retain the 100-mile limitation to be imposed in the first instance but he would not take away from a district judge the power to disregard the limitation in the rare case where its automatic application "can work scandalous injustice."

Reasons for Granting the Writ.

1. The decision of the court below departs from a traditional and long established practice which will have revolutionary consequences in civil cases.

The decision is directly in conflict with the decisions of other courts of appeals. *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 879 (9 Cir. 1956); *Spiritwood Grain Co.* v. *Northern Pac. Ry.*, 179 F. 2d 338 (8 Cir. 1950) (dictum); *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347 (5 Cir. 1948).

This conflict, as well as the importance of the question involved, is recognized and adverted to by the five majority judges and the three judges in the minority who joined in the dissenting opinion.

Moreover, this decision, if not reversed, will lead to a different rule for costs in civil cases from that prescribed by this court for admiralty cases.

This square and irreconcilable conflict which is of general importance in the administration of Civil Law and is certain to have continuing future consequences can be effectively resolved only by the prompt action of this court.

2. The decision of the court below is directly in conflict with the decisions of this court in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78 (1924) and earlier decisions of the same court (*The James McWilliams*, 49 F. 2d 1026 (1931) and of the Ninth Circuit Court of Appeals (*Walker* v. *Lee*, 71 F. 2d 622), Seventh Circuit (*W. F. & John Barnes Co.* v. *International Harvester Co.*, 145 F. 2d 915, cert. den., 324 U. S. 850) and Fifth Circuit (*McWilliams Dredging Co. et al.* v. *Department of Highways of Louisiana*, 187 F. 2d 61), holding that an appeal relating solely to costs, where the question at issue is one going to the discretionary power to allow costs as distinguished from the power of the trial costs to allow or disallow such costs, will not lie.

In the case at bar the trial court's discretion in disallowing and reducing certain items of costs was the sole controverted question presented to the court below.

The court below not only entertained the appeal in disregard of the established rule which prohibits appeals involving only costs, but substituted its discretion for that of the district judge who was uniquely qualified to exercise its discretion according to the justice of this particular case, by reason of personal knowledge acquired at trial and the expression of the Court of Appeals' views expressed after two appeals, one involving a full review of all the facts of this case and one involving the very issue of costs submitted to the trial court for determination.[2]

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[2] *Farmer* v. *Arabian American Oil Company*, 277 F. 2d 46 and 285 F. 2d 720

3. Other important questions which appear not to have been settled which are of great and recurring significance in the administration of civil law are presented. Whether and to what extent a trial judge is bound to defer to the opinions of other judges expressed on the taxation of costs after prior determinations later reversed is one of these. Another is whether a party's election to bring witnesses from afar despite the availability of depositions or interrogatory process automatically entitles him to tax such travel costs without limitation against his unsuccessful adversary. Still another question is whether we are prepared to abandon the traditional American system of costs in favor of the English system never accepted by us because as the late Judge Clark said in his separate dissenting opinion, it favored the rich and unduly penalized the poor.

The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the historic policy designed to keep our courts open to the rich and poor alike make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York City, February 3, 1964

Respectfully submitted,

KALMAN I. NULMAN,
Counsel for Petitioner.

KALMAN I. NULMAN,
WILLIAM V. HOMANS,
Of Counsel.

APPENDIX A.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 240—October Term, 1962.

(Argued February 1, 1963
Submitted to the *in banc* court March 18, 1963
Decided November 6, 1963.)

Docket No. 27893

HOWARD FARMER,
Plaintiff-Appellee,

—v.—

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,* CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL,
Circuit Judges.

Appeal by defendant from taxation of costs in its favor in civil action in the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, 31 F. R. D. 191. Affirmed in part and reversed in part.

KALMAN I. NULMAN, New York, N. Y. (WILLIAM V. HOMANS, New York, N. Y., on the brief), *for plaintiff-appellee.*

CHESTER BORDEAU, New York, N. Y. (WHITE & CASE and WILLIAM D. CONWELL, New York, N. Y., on the brief), *for defendant-appellant.*

LUMBARD, *Chief Judge* (with whom Judges MOORE, FRIENDLY, KAUFMAN and MARSHALL concur):

This appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district and more than 100 miles distant from the place of trial. We hold that costs for such travel may be allowed and in the light of that holding we examine the rulings with respect thereto made by the district judges at the two trials of Farmer's suit for an alleged breach of his contract of employment.

Howard Farmer instituted this litigation on May 24, 1956, in the Supreme Court, New York County, against the Arabian American Oil Company (Aramco). Aramco removed the cause to the United States District Court for the Southern District of New York, there being diversity of citizenship. A trial was had before Judge Palmieri and a jury, which terminated in a jury disagreement. Thereafter, Aramco's motion for a directed verdict was granted, 176 F. Supp. 45 (1959), but this determination we reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960), necessitating a second trial. Farmer failed to comply with an order directing him to post security for costs, and the action was dismissed. We again reversed, holding that the order constituted an abuse of discretion, as it effectively precluded the plaintiff from prosecuting his action because of the expense of procuring the bond, 285 F. 2d 720 (1960). A second jury trial, before Judge Weinfeld, resulted in a verdict for the defendant. The Clerk taxed costs of $11,900.12 which on Farmer's motion were reduced by Judge

Weinfeld to $831.60, and from this order Aramco appeals. After the appeal was heard by a panel consisting of Judges Lumbard, Smith and Hays, the active judges of this court agreed that the appeal should be considered *in banc*.

Some earlier decisions cast doubt on the appealability of a judgment solely for costs. See *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78 (1924); *The James McWilliams*, 49 F. 2d 1026 (2 Cir. 1931); *Walker* v. *Lee*, 71 F. 2d 622 (9 Cir. 1934). However, Rule 54(d) of the Federal Rules of Civil Procedure now governs the granting of costs. It states: "Except when an express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *" The effect of this provision, combined with 28 U. S. C. §1920,[1] is to make the right to statutory costs subject to judicial discretion. Within the careful statutory scheme, no hint of intent to create an element of uncontrolled discretion can be found, nor is one lightly to be implied. Furthermore, it is unquestionably true that the portion of the judgment relating to costs may be reviewed on appeal, for abuse of that discretion, if other issues are also raised. See, e.g., *Chemical Bank & Trust Co.* v. *Prudence-Bonds Corp.*, 207 F. 2d 67 (2 Cir. 1953), 347 U. S. 904 (1954); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7 Cir. 1949), cert. denied, 338 U. S. 948 (1950). We see no reason why we should not hear an appeal from this element alone. It is surely a final judgment within the meaning of 28 U. S. C. §1291. See *Donovan* v. *Jeffcott*, 147 F. 2d 198 (9 Cir. 1945). We hold that when, as here, the question is not whether the district

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[1] Section 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

(3) Fees and disbursements for printing and witnesses."

judge should have allowed or disallowed particular items of costs, but is rather whether he exceeded, and therefore abused, his discretion, a judgment solely for costs is appealable. *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (6 Cir. 1959); *Kemart Corp.* v. *Printing Arts Research Laboratories*, 232 F. 2d 897 (9 Cir. 1956); *Prudence-Bonds Corp.* v. *Prudence Realization Corp.*, 174 F. 2d 288 (2 Cir. 1949); *Harris* v. *Twentieth Century-Fox Film Corp.*, 139 F. 2d 571 (2 Cir. 1943); 6 Moore, Federal Practice 1309 (1953).

In taxing costs, the Clerk included substantial amounts for air transportation of defendant's witnesses from as far away as Saudi Arabia to the place of trial. Judge Weinfeld reduced these assessments to a uniform allowance of $16.00 per witness, or the equivalent of 100 miles each way at $.08 per mile. Judge Weinfeld took this action as an exercise of judicial discretion, choosing not to rely upon the 100-mile limitation frequently imposed by the federal courts on their own power to assess transportation costs of witnesses brought from without the judicial district in which the trial court is sitting. We must therefore first determine the applicability of the 100-mile limitation. We hold the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial.

The 100-mile rule appears to have evolved out of the limitation upon the subpoena power of a federal court to an area within the judicial district or 100 miles from the place of trial. See Federal Rules of Civil Procedure 45(e). There is not a shadow of a suggestion, however, in 28 U. S. C. §1920(3), which provides simply that "fees and disbursements for * * * witnesses" may be taxed as costs, that the court's power to issue a subpoena has anything whatever to do with what constitutes a recoverable disbursement for a witness. Indeed, 28 U. S. C. §1821 as amended in 1949

provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar. Section 1821 expressly provides that *in lieu of* the usual mileage allowance, actual travel expenses shall be allowed to witnesses who are required to travel between "the Territories and possessions, or to and from the continental United States." The great bulk of judicial authority supporting the 100-mile rule is to be found in cases decided prior to the enactment of the 1949 amendment which added the above-quoted provision. *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp* v. *Miller*, 94 F. 2d 347 (5 Cir. 1938). The vast majority of the more recent cases which approve the rule do no more than cite other cases, without considering the reasons which might lend support to it or weigh against it. Those cases decided subsequent to the 1949 legislation give it little or no attention. E.g., *Ludvigsen* v. *Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied, 350 U. S. 1014 (1956); *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied, 349 U. S. 952 (1955). Moreover, in some recent cases in the lower courts the 100-mile rule has been flatly rejected. *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959); *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958).

Whatever the merits of the prior judicial rule, the Congress has not given any compelling evidence demonstrating an intention that it be continued. The reason for the addition of an express provision for actual travel expenses in the case of overseas travel is stated in the letter of the Assistant to the Attorney General, appended to and made

part of the report of the Senate Committee discussing the 1949 bill: "For overseas travel, it is recommended that witnesses be allowed their actual expenses at the lowest first-class rate available. There have been times when witnesses have been required to engage in such travel at a personal financial sacrifice." S. Rep. No. 187, 81st Cong. 1st Sess., reprinted in 1949 U. S. Code Cong. Serv. 1231, 1233.

The 100-mile rule finds as little support in reason as it does in the statutes. Whether a witness comes into court voluntarily or under the compulsion of a subpoena, he comes at the behest of the party for whom he appears as a witness. Either way, he serves the interest of the court in arriving at a just determination of the controversy. See *United States* v. *Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (opinion by Mr. Justice Gray). The fact that a subpoena does not issue because the witness is outside the reach of the court has nothing to do with the problem of how to allocate the cost of his appearance at the trial.

Nor can the 100-mile rule be defended as an allocation of the expenses of litigation in keeping with the practice of our courts to let such expenses fall on the party who incurs them. Fees for legal services are usually the largest single expense of litigation. In most cases, the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further. Certainly there is no reason to extend it by the curious means of limiting the recovery of travel expenses to 100 miles, a figure which may bear no relation to the distance actually traveled. As this case well illustrates, a 100-mile limitation is an anachronism in a day when the facility of world-wide travel and the development of international business make the attendance at trial of witnesses from far off places almost a matter of course.

It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection for the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which the losing party, in the interest of justice, should bear such costs. For example, had the positions in this case been reversed and Farmer been forced to produce witnesses from Saudi Arabia in order to defend against unjust charges of Aramco, one could hardly assert the justice of requiring Farmer to pay the costs of producing his witnesses himself, or risk the failure of his defense. Indeed, adherence to a rigid limitation on the taxation of travel expenses is more likely to work to the detriment of litigants with meager financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case.

There is no reason why a judge should be thought less capable of determining a proper allocation of the costs of witnesses' travel expenses than he is of allocating other expenses of trial, such as transcripts, which are committed without artificial limitation to the discretion of the trial judge. We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful

litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury.

Concluding that the 100-mile rule is inapplicable, we turn to the particular items of costs taxed in the case at bar. At the first trial, Judge Palmieri allowed travel expenses totalling $3,715.21 for transportation of six witnesses, three of whom came from Saudi Arabia. For reasons stated below, we think that, except as to the travel expenses of witnesses Page and Swanson, totalling $2,064.00, it was within the discretion of Judge Palmieri to allow these expenses, and that his exercise of discretion should not have been disturbed. As the judge who presided at the first trial, Judge Palmieri had the greater opportunity to assess the necessity of particular costs incurred in defense of the action before him. This circumstance, considered in the light of the sensitive nature of the problems presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial.

The plaintiff alleged that he had been hired to work as an ophthalmologist at the defendant's hospital in Saudi Arabia, and that he had been wrongfully discharged. In addition to disputing the terms of the employment contract, the defendant contended that the plaintiff had been discharged for just cause, specifically that he had performed an operation without first obtaining the results of certain tests, in violation of an express rule of the hospital and accepted standards of medical practice. The plaintiff's explanation for his discharge was that he had insisted upon truthfully reporting alleged findings that many American employees of the defendant in Saudi Arabia were contract-

ing trachoma, a tropical disease which leads to blindness. He claimed that his superiors had sought to intimidate him into suppressing his findings.

The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense. Judge Weinfeld determined, however, that in view of the heavy expense of producing them in court, the defendant should have relied on written testimony taken in advance of trial or, at least, should itself bear the cost of the witnesses' appearance at trial. We cannot agree.

It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges. We have had occasion in the past to note the importance of "live" witnesses in a trial before a jury. See *Arnstein* v. *Porter*, 154 F. 2d 464, 469-70 (1946). Moreover, in the first instance it is for the judge before whom the trial is had to gauge the necessity for transporting witnesses to the place of trial and to determine the propriety of assessing costs for such transportation against the unsuccessful litigant. We believe Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial before him, just as we defer to him with respect to the costs of the trial at which he presided.

It appears, however, that two of the witnesses, Page and Swanson, occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed.

Judge Palmieri allowed costs of $361.55 for transcripts of pretrial hearings, examinations before trial, and depositions. Judge Weinfeld reduced this amount to $76.05. Considering the importance of pretrial hearings and the discovery procedure under the Federal Rules, we cannot say that it was an abuse of discretion for Judge Palmieri to conclude that these costs were necessary elements of preparation for the first trial, and then to allow them. Similarly, we find it within Judge Palmieri's discretion to allow $1,812.30 for stenographer's fees incurred in compilation of the daily minutes of trial, as well as $180.02 for photostatic copies of certain bulky exhibits, as he found both of these items necessary to the proper conduct of the trial. See 28 U. S. C. §§1920(2), 1920(4). We hold that it was an abuse of discretion in view of Judge Palmieri's findings as to their necessity, for Judge Weinfeld to disallow them.

We sustain in its entirety Judge Weinfeld's determination as to the costs incurred in the trial held before him. Although there are those of us who would have allowed traveling expenses beyond the 100-mile limit had the trial been before us, we cannot say that Judge Weinfeld abused his discretion in limiting costs for transportation of witnesses to the second trial, held before him, to a uniform allowance of $16.00 per witness.

We therefore reverse and remand with instructions to allow the costs as taxed by Judge Palmieri on the first trial, $6,601.08, less $2,064.00 taxed for the travel of Page and Swanson, or a total of $4,537.08 for the first trial, plus those items taxed by Judge Weinfeld on the second trial.

SMITH, *Circuit Judge* (with whom CLARK and HAYS, *Circuit Judges*, join) dissenting:

I dissent, both from the determination that Judge Weinfeld abused his discretion in fixing costs and from the

holding that he had discretion to tax costs for travel over the "100-mile limit." As a matter of judgment the judge taxing costs might have made larger allowances for photostats and transcript on both trials, because of the seriousness of the charges and the importance of the outcome to the parties. But the issues were not extraordinarily complicated nor the trial one of great length, the judge had the benefit of observation of the proceedings directly before him, and I would not hold the judge's decision that much of the expense was not really necessary, error or his limitation of costs so flagrant an error as to constitute an abuse of discretion.

More important, however, to future litigants is the rejection of the limitation almost universally observed in the federal courts heretofore, of the taxation of travel expenses as costs where the travel is from a point without the district and more than 100 miles distant. This decision not only breaks with the overwhelming weight of authority, and creates a different rule for costs in civil cases from that in admiralty, but also, as the majority indeed appears to admit, abandons the traditional scheme of costs in American courts to turn in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own. It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means. Of course there are arguments for the English system, in its discouragement of much litigation, but it is strange to find this court taking this time and opportunity to espouse it in the face of the contrary choice of the Supreme Court when the identical question of taxation of travel expense was before it in the formulation of the Admiralty Rules. I fear that the majority reads into the statute and rule

concerning reimbursement of witnesses and costs a direction as to where the ultimate burden of litigation expense must fall which just isn't there.

In reducing the allowance to the equivalent of mileage for 100 miles each way at 8¢ a mile, Judge Weinfeld did not rely on the limitation referred to which has heretofore been imposed by the courts on the power to assess mileage outside the district and more than 100 miles, but rather took the action as an exercise of discretion. We should consider, however, whether his ruling should be affirmed on the basis of the 100-mile limitation. I would hold that it should be so affirmed. Even though it is now accepted that a witness need not be under subpoena to collect his statutory fees and make the losing party liable for them as costs, it will be noted that most courts that have considered the question have imported the territorial limitation on the subpoena of witnesses[2] (within the district or 100 miles from the place of trial) to limit the distance for which mileage fees can be taxed as costs. *Ludvigsen* v. *Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied 350 U. S. 1014 (1956); *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Spiritwood Grain Co.* v. *Northern Pac. Ry.*,

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[2] Rule 45(e) of the Federal Rules of Civil Procedure.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. §1783.

179 F. 2d 338 (8 Cir. 1950) (dictum); *Friedman* v. *Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347 (5 Cir. 1948); *Perlman* v. *Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied 349 U. S. 942 (1955); *Kenyon* v. *Automatic Instrument Co.*, 10 F. R. D. 248 (W. D. Mich. 1950); *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259 (W. D. Mo. 1951); modified on another ground, 194 F. 2d 846 (8 Cir.), cert. denied 343 U. S. 942 (1952); *Barnhart* v. *Jones*, 9 F. R. D. 423 (S. D. W. Va. 1949); *Gallagher* v. *Union Pac. Ry.*, 7 F. R. D. 208 (S. D. N. Y. 1947); *Anonymous*, 1 Fed. Cas. 992 (C. C. S. D. N. Y. 1863); *Beckwith* v. *Easton*, 3 Fed. Cas. 29 (D. C. E. D. N. Y. 1870); *The Leo*, 15 Fed. Cas. 326 (D. C. E. D. N. Y. 1872); *Buffalo Ins. Co.* v. *Providence & Stonington S.S. Co.*, 29 Fed. 237 (C. C. S. D. N. Y. 1886); *The Vernon*, 36 Fed. 113 (D. C. E. D. Mich. 1888); *The Syracuse*, 36 Fed. 830 (C. C. S. D. N. Y. 1888); *Kirby* v. *United States*, 273 Fed. 391 (9 Cir. 1921), aff'd 260 U. S. 423. (The affirmance does not mention the problem); *Consolidated Fisheries* v. *Fairbanks, Morse & Co.*, 106 F. Supp. 714 (E. D. Pa. 1952); *Lee* v. *Pennsylvania R.R. Co.*, 93 F. Supp. 309 (E. D. Pa. 1952); *Commerce Oil Refining Co.* v. *Miner*, 198 F. Supp 895 (D. R. I. 1961); *Reynolds Metals Co.* v. *Yturbide*, 258 F. 2d 321 (9 Cir. 1958), cert. denied 358 U. S. 840. Besides this authority, Moore approves the rule, although without discussion or analysis. 6 Moore, Federal Practice, pp. 1362-63. Contra, *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959); *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America* v. *Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958); *Knox* v. *Anderson*, 163 F. Supp. 822 (D. Hawaii 1958). Besides *United States* v. *Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (Gray, *J.*) which

rejects the 100 mile rule, there is other authority to the same effect from Massachusetts. See *Prouty* v. *Draper*, 20 Fed. Cas. 13 (C. C. D. Mass. 1842) (Story, *J.*). The First Circuit, however, cannot really be taken as having this position today. *The Governor Ames*, 187 Fed. 40, 50 (1 Cir. 1910) states the rule which had been followed in the District of Massachusetts but criticizes it. The District Court in *Commerce Oil Co.* v. *Miner, supra*, felt itself not bound by the old cases and went on to follow the great weight of authority.[3]

The sole remaining support for the rejection of the 100-mile limitation, therefore, would seem to be the District Court cases in the Southern and Eastern Districts of New York, and the single case from the District of Hawaii. With all deference, I feel that the rejection of the rule advocated by these few cases and carried out by our brethren in this case is based on an erroneous reading of the proviso added in 1949 to 28 U. S. C. §1821. The legislative history of the proviso, 1949 U. S. Code Cong. Service, pp. 1231-3, discloses only a concern for the inadequacy of compensation to witnesses, as to rate per diem and mileage, and inadequacy in cases where mileage was below first class fare, with no discussion whatever by the Committee or the Assistant to the Attorney General of the eventual recovery

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[3] From opinion by Judge Day, 198 F. Supp. 895, 899:

"In the absence of any authoritative holding by the Court of Appeals for the First Circuit, I am constrained to follow the reasoning and logic of the rule prevailing in the majority of the federal courts. This rule imposes no undue hardships on a litigant, in view of the liberal provisions of Rule 26 of the Federal Rules of Civil Procedure for the taking of the depositions of persons living outside the district where a case is pending, and for their use at the trial of such case. In the event a litigant feels that the testimony of a witness in person is essential, it is only right and proper that such litigant should bear the excess in cost incident to his personal appearance before the trial court. Accordingly, the allowance for mileage for witnesses residing outside this district shall be limited to 100 miles each way."

of the fees as costs by the prevailing party. It was necessary to obtain authority to pay the expenses of such witnesses at the lowest first class rate so that their attendance could be obtained without financial sacrifice on their part. It is noteworthy that the request came from the Department of Justice and not from the Administrative Office, and that it applies to witnesses in criminal as well as civil and admiralty causes. It is impossible to tell from the language of the statute itself whether the 100-mile rule was within the contemplation of the Congress at the time. Yet some indication of a lack of any purpose to affect the rule may be drawn from the title of the Act which added the proviso, "An Act to increase the fees of witnesses in the United States Courts and before United States Commissioners, and for other purposes" with no mention of any effect on taxable costs. It is hard to believe that the Assistant to the Attorney General was unfamiliar with the 100-mile rule in the light of the volume of government civil and admiralty litigation. This is particularly so in the light of the existence of Admiralty Rule 47,[4] by which the Supreme Court, as early as 1920, recognized and enforced the 100-mile rule. The Supreme Court's power over costs in admiralty was confirmed in the 1948 revision of Title 28, §1925, without any reference to Rule 47. It seems quite anomalous to argue that the Congress which in 1948 confirmed the power of the Supreme Court over costs in admiralty in the face of existing Rule 47 applying the 100-mile travel costs limit, indirectly rejected it a year later by a statute not limited to civil cases.

In the interest of precise statement, I would adopt the formulation of the Ninth Circuit: "Mileage allowable

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[4] Admiralty Rule 47. Costs—travel of witnesses

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.

should be that which was traveled *within* the district, *or* actual mileage traveled in and out of the district up to 100 miles, whichever is the greater." *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc., supra* at 904 (emphasis in original). The point is of more than formal interest in a circuit whose districts include some with distances of more than 100 miles from a seat of court. See *Hayden* v. *Chalfant Press, Inc.*, 281 F. 2d 543 (9 Cir. 1960).

Imposition of this limitation on costs is more in keeping with a fundamental choice in our legal system than allowing an unlimited reimbursement would be. Unlike some other countries we have always left the major portion of the expense of litigation to fall ultimately upon the party who bears it in the first instance. Recovery of attorney's fees and major expenses of preparation for trial is with us the exception rather than the rule. If perhaps, the victor in a just cause is not made entirely whole, the doors of our courts are not closed to the small litigant who cannot risk being ruined by the imposition of his adversary's full expenses. The witness, of course, still recovers his full statutory fees under 28 U. S. C. §1821. The effect of the existing rule is to divide this burden between the party summoning him and the party liable for the statutory costs, with the party who chooses to summon him bearing the larger portion of the costs when extensive travel is chosen in place of testimony by deposition or letters rogatory. I submit that this result will best promote the fair administration of justice in the district courts.[5]

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[5] Judge Moore's language in *Barnhart* v. *Jones, supra*, is quoted:

"• • • The *effect* of a subpoena served outside the district is limited to 100 miles from the place of trial, and it seems only reasonable to infer that Congress must have intended to limit the taxation of mileage to the same distance. If a court in a country as vast as ours permitted taxation of the entire mileage of witnesses without limitation as to distance, an unbearable burden would be imposed upon the conduct of litigation. Such a course might in some cases lead to a result whereby costs be greater than the amount of the recovery.

Judge Weinfeld was therefore correct in result in limiting the travel expense allowed as costs to each witness from without the district to $16.00—8¢ a mile for 100 miles each way for each trial.

Turning now to his rulings on other items we must determine whether there was an abuse of discretion in his disallowance of any of those taxed by the Clerk. At the outset we are faced with the fact that the judgment after the jury disagreement on the first trial was vacated by the reversal on appeal, so that Judge Palmieri's findings as to the necessity and reasonableness of such items as transcript and photostatic copies of portions of exhibits for use at the trial were not binding on Judge Weinfeld in reviewing costs at the time of final judgment. These are matters in which, however, it would seem that great deference should be given by the second judge to the opportunity of the first judge, here Judge Palmieri, to weigh the situation then before him in assessing necessity. The second judge does, however, have an advantage of the additional developments before him subsequent to the first trial, which he may take into consideration. In the light of this, although the writer would as an original matter have been inclined to make the allowance made by Judge Palmieri, at least as to the necessity of photostats[6] and transcripts of pretrial depositions and perhaps also as to the necessity of daily transcript,[7] there is surely ground for difference of

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"Economy in litigation is an essential element of justice. Taxation of unlimited mileage allowances is in derogation of this principle, and cannot be permitted."

[6] Compare *Galion Iron Works & Mfg. Co.* v. *Beckwith Machinery Co.*, 25 F. Supp. 591 (W. D. Pa. 1938) with *Raffold Process Corp.* v. *Castanea Paper Co.*, 25 F. Supp. 593 (W. D. Pa. 1938).

[7] See *Bank of America* v. *Loew's International Corp.*, *supra*; *Perlman* v. *Feldmann*, *supra*.

opinion as to the necessity of photostats and transcript, let alone daily copy, in a trial of these rather simple, though hard fought, issues. It was therefore not an abuse of discretion to disallow the items, and as pointed out by the majority, our review of these items is not to determine whether the findings of Judge Weinfeld as to necessity and reasonableness are correct, but whether they are so grossly in error as to constitute an abuse of judicial discretion.

I would affirm the judgment for costs of $831.60.

CLARK, *Circuit Judge* (concurring in the dissent of Judge SMITH):

I concur completely in Judge SMITH's dissent, expressing, as it does, a wise public policy, buttressed by the overwhelming weight of authority and by long settled federal practice. But I venture a brief additional statement because of the great practical importance of the issue and because the ambiguities and policy conflicts of the majority opinion will require a re-evaluation of the problem either judicially or by rule-makers or legislators. The problem may be made concrete by considering the difficulties hereafter facing district court clerks and judges. Up to now—as shown by inquiry, as well as by the long list of precedents—the clerks have applied the 100-mile limitation on travel of witnesses routinely and substantially without dispute. Now they are faced with two opposing policy approaches and will not be able to act when the issue arises without a full-dress hearing and a court review.

In its attempt to straddle the division of policy disclosed below, the majority decision has all the earmarks of a compromise result. There is nothing inherently wrong in this; at times a compromise among views may be quite desirable. But care must be taken that it does not lead to illogical or conflicting results. Here in practical consequence we

have lavish travel fees allowed on the round of litigation which the defendant lost, and denied on the round it won. The difficulty arises because the decision departs from the wise normal rule that one judge alone is responsible for the ultimate decision of a cause on trial and that this responsibility is not to be shared with or apportioned among those who have made preliminary or interlocutory rulings. As a matter of fact the decision does great injustice to the first judge here, because it holds him to rulings made at a preliminary stage, before much that is relevant had happened, and does not give him an opportunity to review and revise his actions in the light of later events. I regard the responsibility as centered in Judge Weinfeld; but if, contrary to this, we force him to divide it with Judge Palmieri, we should at least have given the latter the opportunity to review his holdings in the light of the full record.

Again it appears that the majority have lacked final courage to reach a completely hard-boiled result, as of course is shown by their reduction of the quite outrageous sum claimed of $11,900.12 (composed mainly of the cost of defendant's bringing its own employees around the world) to $4,537.08, plus the cost allowed of the second trial, apparently $335.55. This sum, totaling nearly $5,000, is not an inconsiderable item; but ironically that required some questionable rulings to reach it. Thus the expenses of witnesses Page and Swanson, totaling $2,064, were disallowed because they occupied otherwise unused space on a company plane. Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees.

There are other factors which, to me, point also to the injustice of the result. At an early stage of the case, we very pointedly criticized lavish travel expenditures in reversing an order for a bond for costs which plaintiff was unable to furnish. *Farmer* v. *Arabian American Oil Co.*, 2 Cir., 285 F. 2d 720. When the defendant persisted, it would seem that the extra expenditures should have been at its own risk and from its own treasury. The majority are surely ill-advised in trying to claim support from the supposed equities; at best shifting sands, here these obviously favor the plaintiff as much as the defendant.[1] Nor is the supposed need of oral testimony an adequate excuse; the jury, in my judgment, is not so stupid as to need to see the defendant's employees in person to decide where the truth lies. And in the federal system we have provided ample means of securing tesimony through depositions and interrogatories, making it reasonable, natural, and practical to limit repayment of travel costs to those only who can be required to come to court by exercise of the court's subpoena power. Indeed, heretofore we have taken the position that a party's preference for oral testimony must be weighed against the burden to his opponent, and an order for depositions or interrogatories must be substituted when travel costs will be burdensome. *Hyam* v. *American Export Lines*, 2 Cir., 213 F. 2d 221, 222-223 (per Harlan, *J.*); *Richmond* v. *Brooks*, 2 Cir., 227 F. 2d 490, 492. Nor is the claim at all realistic that these large allowances may at times favor the impecunious litigant. Such a liti-

[1] Thus the defendant's defense of its discharge of the plaintiff was an attack on the latter's professional competence, calling forth as bitter emotions as did the plaintiff's attack on defendant's hospital conditions. And there seems to have been a great deal of evidence not closely relevant involving plaintiff's marital, litigious, and emotional instability. It should be recalled that it took two juries to settle the plaintiff's fate; the first jury disagreed.

gant will not have the cash to advance originally; nor can he take the chance of being saddled with the cost ultimately. As Judge SMITH so well demonstrates, this argument represents an approach to the English system, never accepted by us because of our conviction that it "favored the wealthy and unduly penalized the losing party."[2] Here the bill of costs, obviously ruinous to a plaintiff who could not afford a cost bond, can mean little more than an instrument of revenge to this great corporation. I submit that it is not wise policy, or consistent with our traditions, to put the decision of the lavishness of the trial for all practical purposes in the hands of the winning litigant.

Judge SMITH gives a fair indication of the strength of the precedents for this traditional view, including the Supreme Court's Admiralty Rule 47, although he does not exhaust the available number.[3] With the recent cases repudiating the few earlier cases contra in the First Circuit, see *Commerce Oil Refining Corp.* v. *Miner*, D. C. R. I., 198 F. Supp. 895, the majority decision is supported only by certain district court decisions here which do not represent the law of our Circuit.[4] And neither statute nor rule

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[2] *Conte* v. *Flota Mercante del Estado*, 2 Cir., 277 F. 2d 664, 672, per Friendly, *J.*, citing Goodhart, *Costs*, 38 Yale L. J. 849, 872-877 (1929).

[3] See, e.g., Annotation 4 to 28 U. S. C. §1821.

[4] *Bank of America* v. *Loew's International Corp.*, D. C. S. D. N. Y., 163 F. Supp. 924, per Dawson, *J.*; *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, D. C. S. D. N. Y., 24 F. R. D. 200, per Dawson, *J.*; *Maresco* v. *Flota Mercante Grancolombiana, S.A.*, D. C. E. D. N. Y., 167 F. Supp. 845, per Byers, *J.* The case of *Knox* v. *Anderson*, D. C. Hawaii, 163 F. Supp. 822, rests on a special statutory provision. See note 6 *infra*. Against these may be cited such important Second Circuit cases as *Perlman* v. *Feldmann*, D. C. Conn., 116 F. Supp. 102, 115, per Hincks, *J.*; *Gallagher* v. *Union Pac. R. Co.*, D. C. S. D. N. Y., 7 F. R. D. 208, per Caffey, *J.*; *Ryan* v. *Arabian Am. Oil Co.*, D. C. S. D. N. Y., 18 F. R. D. 206, 208, per Bondy, *J.*; and other earlier cases cited by Judge Smith.

defines of what these court costs shall consist.[5] As Judge SMITH demonstrates, the decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history.[6] The result reached below, D. C. S. D. N. Y., 31 F. R. D. 191, 197, of $831.60—a not insubstantial sum in itself—is thus based upon strong precedent and long continued, substantially unbroken custom. It is fair and just. It should have been sustained here.

WATERMAN, *Circuit Judge* (in separate statement):

I dissent from the result reached by the majority of the court and agree with my brothers Clark, Smith and Hays that the judgment for costs of $831.60 should be affirmed.

I hold a somewhat different view from my colleagues and therefore submit this separate statement. It is my belief that Judge Weinfeld properly treated the motion before him as a motion addressed to his discretion and that he properly exercised his discretion in his disposition of that

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[5] Thus F. R. 54(d) does not define costs, but leaves their fixing to statute or decisional law. And 28 U. S. C. §1920 defines certain costs such as the fees of the clerk and marshal, but is pointedly unspecific in its subd. (3) covering "Fees and disbursements for printing and witnesses."

[6] This proviso, 63 Stat. 65, to the standard mileage allowance statute, 28 U. S. C. §1821, allowing actual travel expenses to witnesses "attending in any court of the United States * * * who are required to travel between the Territories and possessions, or to and from the continental United States," was obviously passed with no intent to change the long standing federal practice, as Judge Smith demonstrates. Moreover, its wording does not bear the burden attempted to be put upon it, for by its terms it covers travel only between the place of trial and the places listed in the statute which do not include foreign countries. And the comment from the Assistant to the Attorney General adds nothing; the reference to "overseas travel" is to travel to or from the Territories and possessions. The only case on the proviso, *Knox* v. *Anderson*, D. C. Hawaii, 163 F. Supp. 822, involving travel between California and Hawaii (i.e., within its exact terms) expressed some reluctance to construing it as without the usual federal rule.

motion. I differ from the position taken in the opinions of the dissenters relative to the power Judge Weinfeld could exercise over the major items of dispute between the parties—the items relating to the proper taxation of transportation expenses of certain of the prevailing party's witnesses who were not subpoenaed. See Judge Weinfeld's discussion at 31 F. R. D. 191, 195-196.

When a motion to review the taxation of witness costs is presented to a district judge he surely should have in mind the rule my three dissenting brothers would inflexibly apply—the rule that recoverable witness mileage should be limited as of course to travel within the district, or, in the event of travel outside the district, to 100 miles of the place of hearing. Nevertheless, such a motion is a proper one to make, and the only purpose of the motion is to have the judge's independent judgment exercised. It is obvious that Judge Weinfeld did have this long-standing rule in mind when he so properly held that the costs movant requested should not be allowed.

I would lay down a rule that, in the taxation of costs "as of course to the prevailing party" by the clerks of our district courts, the so-called "one hundred mile rule" must be followed in the first instance, but I would not take away from a district judge the power to modify that taxation if motion be made to the judge so to do. There is always the rare case—which neither Judge Weinfeld nor I would find this case to be—where taxation inflexibility can work scandalous injustice.

APPENDIX B.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November, one thousand nine hundred and sixty-three.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,

Hon. CHARLES F. CLARK,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. THURGOOD MARSHALL,
Circuit Judges.

HOWARD FARMER,
Plaintiff-Appellant,

v.

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U. S. D. J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the defendant-appellant.

A. Daniel Fusaro,
Clerk.

APPENDIX C.

Statutory Provisions.

28 U. S. C. A. § 1821

CHAPTER 119—EVIDENCE; WITNESSES

§ 1821. Per Diem and mileage generally; subsistence

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further,* That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day. As amended Oct. 31 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798.

RULE 54(d) FEDERAL RULES OF CIVIL PROCEDURE

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C. A. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

Supreme Court of the United States

OCTOBER TERM, 1963

No. 33

ARABIAN AMERICAN OIL COMPANY,

Petitioner,

against

HOWARD FARMER,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHESTER BORDEAU,
Counsel for Petitioner,
14 Wall Street,
New York, New York 10005

JOHN D. LOCKTON, JR.,
WHITE & CASE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1963

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ARABIAN AMERICAN OIL COMPANY,

Petitioner,

against

HOWARD FARMER,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Arabian American Oil Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered in the above titled action on November 6, 1963.

Howard Farmer, respondent here, has filed a petition, dated February 3, 1964, for a writ of certiorari to the United States Court of Appeals for the Second Circuit, for review of the same judgment, copies of which were served on petitioner here, as respondent, on January 31, 1964.

Your petitioner cross-petitions for the granting of a writ of certiorari.

Opinions Below.

The two opinions of Judge Edmund L. Palmieri of the United States District Court, Southern District of New York, awarding costs in favor of petitioner, may be found at pages 31a and 37a of the Record. The opinion of Judge Edward Weinfeld of the United States District Court, Southern District of New York, awarding costs in favor of petitioner, is reported at 31 F. R. D. 191 and may be found at page 59a of the Record. The opinion in the Court of Appeals for the Second Circuit reversing and remanding to allow certain of the costs taxed by Judge Palmieri, plus those items taxed by Judge Weinfeld, is reported at 324 F. 2d 359 and may be found at page 74a of the Record.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered November 6, 1963. (Appendix A, pages A1 and A2)

The statutory provision conferring jurisdiction on this court is found at 28 U. S. C. §1254(1).

Question Presented.

May a trial judge take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of litigation in awarding such costs pursuant to 28 U. S. C. §1920 and Rule 54(d) of the Federal Rules of Civil Procedure?

Statutes Involved.

Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §§1821 and 1920 are set forth at pages B-1 and B-2 of appendix.

Statement of the Case.

Respondent commenced this action in the Supreme Court of the State of New York, New York County. The action was removed by defendant to the United States District Court of the Southern District of New York upon the grounds of diversity of citizenship of the parties and the involvement of the required jurisdictional amount.

Respondent, an ophthalmologist, sued petitioner for $160,000[1] on the ground that petitioner terminated respondent's employment prior to the end of the term for which respondent alleged he was employed. He claimed that he was discharged by petitioner for truthfully reporting alleged findings that many American employees were contracting trachoma, a tropical disease which may lead to blindness and that his superiors sought to intimidate him into suppressing his findings. Petitioner, to the contrary, introduced evidence that respondent was employed at will and that respondent was discharged for good cause for his violation of an express rule of petitioner's hospital and accepted standards of medical practice in performing an operation on a four year-old patient.

The case was tried before the Honorable Edmund L. Palmieri and a jury resulting in a disagreement among the jury. Judge Palmieri dismissed the complaint on legal grounds (176 F. Supp. 45). Costs of $6,601.08 were then

[1] Increased from $4,000 on June 17, 1960.

awarded to petitioner. The award included the expense entailed by petitioner in bringing certain witnesses from Saudi Arabia. The witnesses were necessary to rebut respondent's contention.

Judge Palmieri's decision, dismissing the complaint, was reversed by the Court of Appeals, 277 F. 2d 46, and the case was remanded for a new trial. A writ of certiorari was denied by this Court (364 U. S. 824).

Prior to the second trial petitioner made a motion to require respondent to post a bond for costs. The motion was granted by the Honorable Richard H. Levet of the District Court, Southern District of New York. Thereafter the action was dismissed by the Honorable Lloyd F. MacMahon of the District Court, Southern District of New York, for respondent's failure to post the required bond. The Court of Appeals reversed the decisions of these two district judges. 285 F. 2d 720 at 722.

The case was retried before the Honorable Edward Weinfeld and a jury. A verdict was returned for petitioner.

The Clerk of the court thereafter taxed costs of $11,900.12 for petitioner's expenses on both the first and second trials. On motion by respondent, Judge Weinfeld disallowed a substantial portion of these costs, including costs awarded to petitioner by Judge Palmieri in the first trial, and limited petitioner's costs to $831.60. With regard to transportation from Saudi Arabia, Judge Weinfeld held that petitioner could recover no costs for witnesses who rode on petitioner's planes, maintained and operated by it, and could recover costs for only the last one hundred miles of the journey of witnesses flown in on commercial airlines.

Judge Weinfeld's opinion refers to the "great disparity in the financial resources of the parties" and he apparently limited petitioner's recovery of costs on the ground that petitioner was a "rich litigant."

The Court of Appeals, sitting in banc, reversed and remanded Judge Weinfeld's determination of costs by a 5-4 decision. The majority held "the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial," and that "Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial."

Chief Judge J. Edward Lumbard of the Court of Appeals stated (page A-7 of appendix to petition of Farmer):

> "We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury."

By this statement the Court of Appeals apparently affirmed that if, as appears from Judge Weinfeld's opinion, Judge Weinfeld limited petitioner's costs on the basis that petitioner was a "rich litigant", this did not constitute an abuse of discretion.

While the majority held that the discretion of Judge Palmieri as to the costs on the first trial should have been respected, they disallowed the costs awarded by Judge Palmieri for two material witnesses who were paid no costs for their travel and lodging and were flown in from Saudi Arabia on petitioner's planes in seats that otherwise would have been vacant. These planes were owned, maintained and operated by petitioner at substantial expense. The charges allocated by petitioner for their transportation was substantially less than the lowest first-class rate available. The Honorable Charles E. Clark dissented from this holding, stating:

> "* * * Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees."

The overwhelming weight of authority supports Judge Clark's position. See, *e.g., Vincennes Steel Corporation* v. *Miller*, 94 F. 2d 347, 349 (C. A., 5th Cir. 1938); *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d 338, 344 (C. A., 8th Cir. 1950); *Kemart Corporation* v. *Printing Arts Research Lab.*, 232 F. 2d 897, 901, 902, 904, 905 (C. A., 9th Cir. 1956).

Reasons for Granting the Writ.

1. The position of the Court of Appeals, that relative financial resources of litigants can be weighed in awarding costs, raises fundamental questions in the interpretation

of Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920.

2. In principle at least, the position of the Court of Appeals in this respect is in direct conflict with decisions of courts of appeal for other circuits. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (C. A., 7th Cir. 1949), *cert. denied* 338 U. S. 948 (1950); *Lichter Foundation* v. *Welch*, 269 F. 2d 142 (C. A., 6th Cir. 1959).

3. Fundamental questions in the administration of justice in the federal courts are raised by the denial of costs to the richer of two litigants because of wealth.

4. The position of the Court of Appeals will endanger the longstanding policy of this Court toward encouraging settlements and discouraging "strike suits".

Argument in Support of Reasons.

1. It has long been the general rule that the successful party is entitled to costs, "which are allowed to the successful party by way of amends for his expense and trouble in prosecuting [or defending] his suit." *Day* v. *Woodworth*, 13 How. (54 U. S.) 363, 372 (1851); 6 MOORE'S FEDERAL PRACTICE, §54.70 [3], p. 1304 (2nd Ed.)

Prior to the Federal Rules of Civil Procedure, in the absence of a statutory provision otherwise providing, the prevailing party in an action at law was entitled to costs as of right. *Ex parte Peterson*, 253 U. S. 300, 317, 318 (1920); 6 MOORE §54.70 [3], p. 1340. With the promulgation of Rule 54(d) of the Federal Rules of Civil Procedure, the trial judge was given discretion under 28 U. S. C. §1920, to allow or disallow costs to the prevailing party.

A fundamental and novel question as to the proper exercise of this statutory discretion has been raised by the

position, adopted by the Court of Appeals for the Second Circuit, that the relative financial resources of litigants are to be considered in awarding costs. Other circuits have never interpreted Rule 54(d) or 28 U. S. C. §1920 to hold that the fact that a successful defendant is sued by a less rich plaintiff is proper grounds to deny the defendant his costs. Cf. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (C. A., 7th Cir. 1949), *cert. denied* 338 U. S. 948 (1950); *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142, 146 (C. A., 6th Cir. 1959).

It is respectfully submitted that the interpretation placed on Rule 54(d) and 28 U. S. C. §1920 by the Court of Appeals is erroneous and should be reversed.

2. Heretofore federal courts have adhered to the position that "departure from the rule of awarding costs to the prevailing party should only be for good cause." 10 CYCLOPEDIA OF FEDERAL PROCEDURE, §38.17, p. 377 (3rd Ed.). Only where the prevailing party has been guilty of some improper conduct in the course of the litigation have costs been denied. As stated by the Honorable Otto Kerner in *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 11 (1949), *cert. denied* 338 U. S. 948 (1950):

> "While there is no question that, under Rule 54(d), Rules of Civil Procedure, 28 U. S. C. A. which provides: 'Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *' the court has discretion over the allowance of costs, we think the facts disclosed did not justify the exercise of that discretion. *As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his*

> *part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case.* [citations omitted] *A party, although prevailing, would be denied costs for needlessly bringing or prolonging litigation."* (Emphasis added.)

There has been no contention here that the witnesses called by petitioner were unnecessary or that their testimony did not relate to material issues of fact in this case. It has been noted that the issues in this case presented sharp questions of fact, a most suitable situation for the production of live witnesses for the purpose of resolving the questions of fact.[2]

It must be clear to anyone that the use of written interrogatories would have been completely inadequate, particularly in view of the changes in position taken by respondent from time to time before and during the trial. The testimony of the witnesses was availed of in both trials.

Judge Palmieri allowed traveling expenses of a witness from Beirut, Lebanon, in the sum of $1,531.50 (R. 32-a). Judge Weinfeld allowed traveling expenses for this same witness in the sum of $16.00 (R. 42-a). It seems that there must be some abuse of discretion in one trial judge making an allowance of traveling expenses of $1,531.50 and another judge making an allowance of $16.00 in the same action, with the same issues and with the same witnesses testifying to the same material facts. Both judges, in making any allowance for traveling expenses, concluded that the attend-

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[2] Judge Palmieri, 176 F. Supp. 45, 47 (1959); Judge Palmieri's charge to jury (R. 1364); Judge Weinfeld's charge to jury (R. II-1044); Chief Judge Lumbard, at page A-9 of appendix to petition of Farmer.

ance of the witness was necessary and that his testimony was material.

The ability of petitioner or any other litigant to pay its own costs certainly is not a "defection" for which "a penalty" should be imposed. *Lichter Foundation, Inc.* v. *Welch*, 269 F. 2d 142 (C. A., 6th Cir., 1959). In *Lichter*, a taxpayer won a large judgment against the Collector of Internal Revenue in an action for a tax refund. The taxpayer had cost "in the approved amount of $2,165.40" but the district judge awarded costs of $5, "expressing the view that since it was a discretionary matter with the Court and the appellant having recovered a huge judgment could amply afford to pay the costs in the case, he was exercising his discretion in the matter and limiting costs to $5." (260 F. 2d at 144, 146). The Honorable Shackelford Miller of the United States Court of Appeals for the Sixth Circuit held that the partial denial of costs on the basis of what the successful litigant could afford was an abuse of discretion.

It is submitted that the serious conflict between this holding and the position of the Court of Appeals, allowing the denial of costs on the basis of relative financial resources, should be resolved in favor of petitioner to obtain uniformity in the application of Rule 54(d) and 28 U. S. C. §1920.

3. The issue raised by the position of the Court of Appeals is not as to the costs available in a suit by a poor person. No apparent attempt was made to change the law relieving a poor person suing in *"forma pauperis"* of certain costs. 28 U. S. C. § 1915. If any such change was contemplated by the Court of Appeals, it is submitted that this is a matter for Congress, not the courts.

What the position of the majority of the Second Circuit does involve is the *relative* financial resources of litigants,

the question posed being whether costs should be denied to the more rich in a suit by the less rich. Fundamental questions in the administration of justice in the federal courts are raised by a holding which will result in the denial of costs to the richer of two litigants merely because of his wealth. The basic American legal concept that "equal justice under the law" is to extend to rich and poor alike seems seriously endangered. It is submitted that any such fundamental and unprecedented change in our legal process as is proposed by the Court of Appeals for the Second Circuit is a matter for Congress not the courts.

4. A reversal of the decision of the Court of Appeals for the Second Circuit is made essential further by the dangerous effect its position will have in encouraging litigation. Professor Moore emphasizes that "The extent to which expenses are allowed as costs can have a significant effect upon encouragement or discouragement of litigation". 6 MOORE § 54.70[2], page 1303 (2nd Ed.).

There can be no doubt that the settlement process will be impeded if costs are awarded on the basis of the relative financial resources of litigants. The poorer litigant, secure in the knowledge that in the Second Circuit he will not be liable for costs, will be encouraged to sue in the Second Circuit and to proceed to litigation on even the most unmeritorious claims. The federal courts in the Second Circuit, already heavily burdened, will be confronted with a new mass of needless litigation.

The fact that a successful defendant may be denied his costs will make it far more likely the poor litigant can obtain a sizable settlement for "nuisance value", and thus will be encouraged to bring unmeritorious actions.

It is submitted the long standing policy of this Court towards encouraging settlements and discouraging strike suits should not be allowed.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: New York, New York,
February 3, 1964.

Respectfully submitted,

CHESTER BORDEAU,
Counsel for Petitioner.

JOHN D. LOCKTON, JR.,
WHITE & CASE,
Of Counsel.

APPENDIX A.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November, one thousand nine hundred and sixty-three.

Present:

Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. CHARLES F. CLARK,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. THURGOOD MARSHALL,
Circuit Judges.

HOWARD FARMER,
Plaintiff-Appellant,

v.

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U. S. D. J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the defendant-appellant.

A. Daniel Fusaro,
Clerk.

APPENDIX B.

Statutory Provisions.

28 U. S. C. § 1821

CHAPTER 119—EVIDENCE; WITNESSES

§ 1821. Per Diem and mileage generally; subsistence

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided,* That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further,* That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day. As amended Oct. 31, 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798.

RULE 54(d) FEDERAL RULES OF CIVIL PROCEDURE

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

[redacted] 32

HOWARD FARMER,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States

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HOWARD FARMER,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 53) is reported at 31 F. R. D. 191. The opinions of the Court of Appeals for the Second Circuit (R. 66) are reported at 324 F. 2d 359.

Jurisdiction.

The judgments of the Court of Appeals were entered on November 6, 1963 and December 18, 1963. The petition for a writ of certiorari was filed on February 3, 1964, and granted on March 9, 1964. The jurisdiction of this Court rests upon 28 U. S. C. §1254(1).

Statutes, Rules and Regulations Involved.

The statutory provisions involved are 28 U. S. C. §1821, Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920. They are set forth in the Appendix, pp. A-1 to A-2.

Questions Presented

1. Whether Congress intended by its 1949 amendment to 28 U. S. C. §1821, to reject the 100 mile travel limitation rule for civil cases and create a different rule of costs in civil cases from that in admiralty, and to abandon the traditional scheme of costs in American Courts which requires each party to pay his own litigation expenses, thereby denying, to a substantial number of our citizens, access to our Courts.

2. Whether the discretion as to costs granted a District Judge by Rule 54(d) of the Federal Rules of Civil Procedure is limited by the views expressed by another District Judge in entering judgment, later reversed, upon a prior trial, and whether the failure to adopt the views of the Judge at the earlier trial, constitutes an abuse of discretion.

3. Whether Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920 change the established rule preventing appeals from decrees for costs alone when the power of the court to assess costs against either party is not in dispute and only the mere the amount to be fixed is in issue.

Statement

Plaintiff,[1] a medical doctor, instituted this action in the New York Supreme Court to recover $4,000[2] damages for wrongful discharge. Defendant removed the cause to the United States District Court for the Southern District of New York on the ground of diversity of citizenship.

A trial before District Judge Palmieri and a jury resulted in a jury disagreement followed by a directed verdict of dismissal of plaintiff's complaint, 176 F. Supp. 45 (1959) and the entry of a judgment for costs against plaintiff in the sum of $6,601.18.

On appeal to the United States Court of Appeals for the Second Circuit, that court reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960).

Thereafter defendant sought and was granted an order directing plaintiff to post security for costs in the sum of $6,000. Upon plaintiff's failure to comply with such order his action was dismissed. The Court of Appeals for the Second Circuit again reversed, 285 F. 2d 720 (1960) holding that the order constituted an abuse of discretion as it effectively precluded plaintiff from prosecuting his action because of the expense of procuring the bond.

A second jury trial before District Judge Weinfeld resulted in a verdict for defendant. The clerk taxed costs of $11,900.12, which were, on plaintiff's motion reduced by Judge Weinfeld, in the exercise of his discretion, to $831.61, allowing witness-travel costs at only sixteen dollars per witness, the equivalent of 100 miles each way at eight cents per mile.

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[1] The parties are referred to as plaintiff and defendant.

[2] Later twice amended on defendant's demand to reflect estimated damages.

On appeal by defendant, on the sole issue of the amount of the costs, to a panel of the United States Court of Appeals for the Second Circuit consisting of Chief Judge Lumbard and Judges Smith and Hays, the active judges of that court on their own motion agreed that the appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district and more than 100 miles distant from the place of trial, and that the appeal should be considered *en banc*.

The Court below divided on the question, Chief Judge Lumbard (with whom Judges Moore, Friendly, Kaufman and Marshall concur) refusing to follow what the late Judge Clark describes in his separate dissent as "a wise public policy buttressed by the overwhelming weight of authority and by long settled federal practice" because of the expressed belief (i) that the 100-mile limitation is an anachronism which Congress had not, by its 1949 amendment to 28 U. S. C. §1821, given any compelling evidence of an intention that it be continued; (ii) that the decisions of the other Courts of Appeals upholding the 100-mile rule were either decided prior to the 1949 amendment or, where decided thereafter, the "vast majority" do no more than cite other cases; and (iii) there is no reason to extend the practice of letting trial expenses fall on the party who incurs them beyond the costs of fees for legal services.

Judge Smith (with whom the late Judge Clark and Judge Hays concur) dissents and states that the majority decision not only is contrary to the overwhelming weight of authority and decisions of the other Courts of Appeals but that it creates a different rule for costs in civil cases from that in admiralty and, more important, it abandons the traditional scheme of costs in American courts to turn

in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own.

The late Judge Clark concurs in the dissent of Judge Smith and, in a separate opinion, reiterates the point that the weight of authority favors the traditional view upholding the 100 mile limitation and asserts that the majority decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history. With respect to the majority view that the taxing judge must share his responsibility with the first trial judge by adopting that judge's views as to the *quantum* of costs to be taxed for the first trial, Judge Clark expresses the belief that it is a wise normal rule that one judge alone is responsible for the ultimate decision of a cause on trial, and that this responsibility is not to be shared with or apportioned among those who have made preliminary or interlocutory rulings.

Judge Waterman dissents, in a separate statement, from the result reached by the majority. He would affirm the judgment on appeal and would retain the 100-mile limitation to be imposed in the first instance but he would not take away from a district judge the power to disregard the limitation in the rare cases where its automatic application "can work scandalous injustice."

The majority held that the taxing judge lacked the power to disregard the first trial judge's determination as to costs for that first trial and such disregard constituted an abuse of discretion which gave rise to a right of appeal. Accordingly, the order appealed from was reversed and remanded with instructions to allow the costs taxed by the first trial judge, less the travel costs for two witnesses held improperly taxed by that judge, together with the costs as taxed by the taxing judge.

ARGUMENT.

I.

The decision below, if upheld, would substantially increase the amount of recoverable costs and thwart this country's traditional policy of insuring to all access to our courts.

The costs allowed defendant by the court below amount to $4,537.08. Added to the sum of over $3,000 (not including counsel fees) spent by plaintiff prior to his second appeal to the Court of Appeals, plus the amounts spent or incurred since such appeal in a second trial, a third appeal to the Court of Appeals, and an appeal and cross-appeal to this Court, the total amount is staggering, considered either alone or in relation to the $4 000 demanded in the complaint filed in the New York State court.

Neither the costs awarded after trial nor the sums expended in prosecuting this action would have approached anything approximating either of such figures in the state court, but plaintiff was powerless to resist defendant's removal of this cause to the federal court.

As to the item of expense connected with the prosecution of plaintiff's action, the liberal rules of the federal court which are designed to facilitate trials and the discovery of evidence make such expenditures inevitable when the adversary is resourceful, determined and rich. This item plaintiff is willing, perforce, to meet to the best of his ability in order to vindicate the right, if he can. He has, at any rate, the choice of whether he wishes to proceed or not.

The requirement that he pay defendant's expenses, on the other hand, will not only ruin the plaintiff, who, the Court

of Appeals found was unable to furnish the collateral for a $6,000 bond, 285 F. 2d 720 (1960) but also can result in effectively closing the doors of our courts to future litigants, similarly situated as it would have to this plaintiff, had not the Court of Appeals granted relief. It follows from a defendant's right to tax costs that he has a right, in the case of a non-resident plaintiff, to require a bond in an amount which will secure such defendant against the probable total of those costs.

In order, therefore, for a plaintiff to bring suit either in a federal court (or in a state court under conditions which will enable removal to a federal court) he will not only have to consider his willingness to accept the financial consequences of a defeat, but also must assure himself of the means to buy his ticket of admission to the court. An idea of how many of our citizens may be able to meet the high cost of admission may be gleaned from the excerpt of a survey made by the Bureau of Census and appearing at p. 3 of the publication "Consumer Income", Series P-60, No. 41, issued October 21, 1963 by the U. S. Department of Commerce, appearing herein in Appendix B-1.

In this country where law is supreme, where every right depends on law, where life, liberty and happiness are at stake and where the only lawful way to redress a wrong is through litigation it is imperative that the doors to our Courthouse be kept open to all.[3] That such has been the traditional policy of this country is not open to doubt. That the system of nominal costs followed by the courts in almost all of our states and by the federal courts is a necessary result of such policy is likewise not open to doubt.

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[3] Cf. address of Chief Justice Warren at a Special Meeting of the Association of the Bar of the City of New York held October 29, 1963.

The majority below profess to find from the *failure* of "* * * the Congress * * * [to give] any compelling evidence demonstrating an intention that it [the 100-mile limitation] be continued," a mandate to abandon such rule. Considering the avowed purpose of the legislation it is no more to be expected that Congress would discuss the 100-mile limitation than that it would any other aspect of the taxation of costs.

It hardly seems credible that the Congress, which in the past has not hesitated to enact legislation authorizing, in aid of certain punitive and remedial statutes, the taxation of counsel fees should, if it had decided to effect such a revolutionary change in an historic policy, do so obliquely or resort merely to half measures. Ascertaining congressional intent is at best, an exercise reminiscent of the ancient Roman form of divination, known as Observing the Heavens. Such congressional intent in this case is far, indeed, from manifesting itself with the clarity and definiteness required to support the enlargements of taxable costs. 20 C. J. S., Costs, 262, *et seq.*

However desirable a change may be, no basic change in our system of litigation, that would be effected by substantially increasing the amount of recoverable costs, should be made, except after a thorough study and analysis of federal litigation, valid objectives, and various alternate methods that could be used to achieve the objectives. Moore's Federal Practice, Second Edition, p. 1304.

Only in that way can we insure that we will keep justice democratic and that before it all men shall be equal and it shall be available to all.

II.

The limitation imposed by the court below on the taxing judge's discretion is without sanction in law and contrary to orderly and established procedure.

To confer discretion on a district judge to tax costs and impose on him, at the same time, a mandate to exercise such discretion in conformity with another judge's judgment is an anomaly in law. Rule 54(d), which grants the power, imposes no such limitation, nor, except in the decision below, does any other rule of law or regulation of which we have any knowledge.

The reasons assigned by the Court below for imposing this stricture are: (i) the first judge, because of having presided at a prior trial, had the greater opportunity to assess the necessity of particular costs incurred in the trial before him; and (ii) this circumstance, "considered in the light of the sensitive nature of the problem presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial."

As to the first of these reasons, it need hardly be said that the determination as to whether and in what amount costs should be granted should be made on the basis of *all* the facts and developments to the date of the rendition of judgment. Obviously, a judge who had presided at a first trial could not possibly take into account any events beyond the date of his determination.* Thus, any observations made by an appeals court on the costs taxed at the first trial (as Judge Clarke, R 82, and Judge Weinfeld R 55, 56, noted) can have no possible effect upon those costs.

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* Note, Col. L. Rev. Vol. 64, May 1964, No. 5, P 955.

Next, to impose upon a judge an inescapable requirement that he accept the views of the first trial judge, leaves him no choice but to accept the palpably erroneous award in this case of full travel allowance to the two witnesses who travelled in company airplanes and occupied space which otherwise would have remained unoccupied.

Were such rule to prevail, a plaintiff against whom such errors were committed would have no right of appeal since it could not be said that the second judge was guilty of an abuse of discretion in adopting a bill of costs which he had no discretion to reject.

As to the court's concern for the sensibilities of the district court, we respectfully say that discretion never means the arbitrary will of the judge, but, as Chief Justice Marshall defined it, is "a legal discretion to be exercised in discerning the course prescribed by law; when that is discerned it is the duty of the courts to follow it. It is to be exercised, not to give effect to the will of the judge, but to that of the law." *Tripp* v. *Cook*, 26 Wend (N.Y.) 143, 152.

Under that definition, there is no greater reason for a district judge to resent a contrary view in the matter of the taxation of costs, than there is in other interlocutory rulings and determinations, which, under settled law of the second circuit, district judges are at liberty to decide contrary to previous decisions by other judges. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 134 (2d Cir. 1956).

Moreover, we venture to say that, if by the time a judge ascends the bench he has not become inured to the trauma occasioned by contrariety of opinion, surely he will have become so after his first reversal.

But a proper regard for a judge's sensibilities, does not, we submit, justify any departure from established proce-

dure designed to insure justice nor the imposition upon a judge of a requirement that in the exercise of his conscience he be bound by the conscience of another.

The limitation on the taxing judge's power is, we submit, contrary to the statute and to orderly procedure, and not in the interests of justice.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Dated: New York City,
August 24, 1964.

KALMAN I. NULMAN
Counsel for Petitioner.

KALMAN I. NULMAN,
WILLIAM V. HOMANS,
Of Counsel.

APPENDIX A-1.

Statutory Provisions.

28 U. S. C. A. § 1821

CHAPTER 119—EVIDENCE; WITNESSES

§ 1821. Per Diem and mileage generally; subsistence

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance; *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day. As amended

Oct. 31, 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798.

RULE 54(d) FEDERAL RULES OF CIVIL PROCEDURE

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C. A. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

Appendix B-1.

Income of Families and Persons in the United States.

Table B.—FAMILIES AND UNRELATED INDIVIDUALS BY TOTAL MONEY INCOME, FOR THE UNITED STATES: 1947 AND 1950 TO 1962

(In current dollars; percent not shown, where less than 0.5)

Total money income (current dollars)	1962	1961	1960	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950	1947
FAMILIES														
Number thousands	46,998	46,341	45,435	45,062	44,202	43,714	43,445	42,843	41,934	41,202	40,832	40,578	39,929	37,237
Percent	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Under $3,000	20	21	22	23	24	25	26	29	31	30	33	36	43	49
$3,000 to $4,999	19	20	20	22	25	26	27	30	31	32	34	35	34	31
$5,000 to $6,999	22	22	24	24	24	25	23	22	21	21	20	18	14	12
$7,000 to $9,999	21	21	20	19	17	16	16	13	11	12	9	7	6	5
$10,000 to $14,999	13	11	10	9	8	6	6	5	5	4	3	3	3	3
$15,000 and over	5	5	4	3	2	2	2	1	1	1	1	1		
Median income	$5,956	$5,737	$5,620	$5,417	$5,087	$4,971	$4,783	$4,421	$4,173	$4,233	$3,890	$3,709	$3,319	$3,031
UNRELATED INDIVIDUALS														
Number thousands	11,013	11,163	10,900	10,702	10,751	10,313	9,658	9,766	9,623	9,514	9,705	9,142	9,366	8,165
Percent	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Under $3,000	66	67	67	70	70	72	73	77	78	78	78	81	85	89
$3,000 to $4,999	16	17	20	18	19	18	19	17	16	17	17	16	13	8
$5,000 to $9,999	15	13	12	10	9	9	7	5	5	4	4	3	2	2
$10,000 to $14,999	2	2	1	1	1	1	1	1	1	1	1			1
$15,000 and over	1	1		1	1									
Median Income	$1,753	$1,755	$1,720	$1,556	$1,486	$1,496	$1,426	$1,316	$1,224	$1,394	$1,409	$1,195	$1,045	$ 980

Reprint from Publication Entitled Consumer Income, Series P-60 No. 41, October 21, 1963.
Issued by U. S. Dept. of Commerce, Bureau of Census

Supreme Court of the United States

OCTOBER TERM, 1964

No. 33

ARABIAN AMERICAN OIL COMPANY,
Petitioner,

vs.

HOWARD FARMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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WHITE & CASE,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 33

ARABIAN AMERICAN OIL COMPANY,

Petitioner,

vs.

HOWARD FARMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

The Honorable Edmund L. Palmieri of the United States District Court, Southern District of New York, delivered two opinions awarding costs in favor of petitioner after the first trial. They may be found at pages 28 and 33 of the Transcript of Record.[1] The Honorable Edward Weinfeld of that court after the second trial delivered an opinion awarding costs in favor of petitioner. It may be found at 31 F. R. D. 191 and at T 53.

The Court of Appeals for the Second Circuit delivered an opinion reversing and remanding so as to allow certain of the costs taxed by Judge Palmieri after the first trial but disallowed by Judge Weinfeld, and in addition allowing the costs taxed by Judge Weinfeld. The majority opinion and dissenting opinions are found at 324 F. 2d 359, *et seq.* and at T 66, *et seq.*

The judgment of the Court of Appeals sought to be reviewed was entered November 6, 1963 (T 86).

[1] Hereinafter the Transcript of Record will be referred to as T. followed by the page number.

Jurisdiction.

The statutory provision conferring jurisdiction on this Court is Title 28 of the United States Code, §1254(1).

On March 9, 1964, this Court entered an order (376 U. S. 942) granting the petition (No. 808) submitted by Arabian American Oil Company (Aramco) for certiorari to the United States Court of Appeals for the Second Circuit as well as the petition (No. 804) submitted by Howard Farmer (Farmer) and consolidated the proceedings for argument.

Questions Presented.

1. Should not a federal court's discretión with respect to the taxation of witnesses' travel expenses as costs against the unsuccessful party be directed solely to a determination as to whether or not the oral testimony of such witnesses at the trial was material and necessary?

2. Does not a federal trial judge have the authority under Federal Rule of Civil Procedure 54(d), 28 U. S. C. §1920 and 28 U. S. C. §1821 to tax against the unsuccessful party the total travel expenses of material and necessary trial witnesses, regardless of distances travelled to and from the place of trial?

3. Would it not be an abuse of discretion for a federal district judge under Federal Rule of Civil Procedure 54(d) and 28 U. S. C. §1920, to refuse to tax as costs against the unsuccessful plaintiff the travel expenses of defendants' witnesses who travel from distant places to the place of trial:

A. In an action in which a plaintiff bases his entire case on testimony concerning events in a distant part

of the world and effective rebuttal depends on the live oral testimony of witnesses from such distant places?

B. In an action in which a jury finds in effect that that testimony of plaintiff, which defendant had to rebut through live testimony, was false?

C. In an action in which plaintiff changes at trial the testimony which he had given at an examination before trial or at a previous trial?

4. Is it not an abuse of discretion for a federal district judge to limit the amount of witnesses' travel expenses taxed as costs against an unsuccessful party on the basis of the relative financial resources of the parties?

5. Where there have been two trials of an action before different judges of a federal district court, neither trial resulting in a judgment for plaintiff, is it not an abuse of discretion for the judge on the second trial to review and re-assess the costs taxed by the judge on the first trial?

6. Was the Court of Appeals not in error when it failed to affirm the award of costs made by Judge Palmieri at the first trial on the basis of the incremental costs to Aramco of transporting two necessary and material witnesses to and from the place of trial on its own planes?

7. Is not a federal district court judgment appealable even though it is solely for costs where the issue is whether there was an abuse of discretion by the trial judge taxing costs and this issue requires the resolution of fundamental questions regarding the interpretation and construction of statutes and specific rules of law?

Statutes Involved.

Rules 26(d)(3), 37(c), 45(e)(1) and 54(d) of the Federal Rules of Civil Procedure are set forth at pages 1a and 2a of the appendix. 28 U. S. C. §§1821, 1915, 1920, 1924 and 1925 are set forth at pages 2a-5a of the appendix. The Act of September 24, 1789, c. 20, §30 (1 Stat. 88), of March 2, 1793, c. 22, §6 (1 Stat. 335), and of February 28, 1799, c. 19, §6 (1 Stat. 626) are set forth at pages 5a-8a of the appendix. Admiralty Rule 47 and New York Southern and Eastern District Local Civil Rule 5(a) are set forth at page 8a of the appendix.

Statement of the Case.

A. District Court Proceedings.

Farmer commenced this action in the Supreme Court of the State of New York, New York County. The action was removed by Aramco to the United States District Court for the Southern District of New York upon the grounds of diversity of citizenship and the involvement of the requisite jurisdictional amount.

Farmer, an ophthalmologist, sued Aramco for $160,000. (T 6).[2] The amended complaint alleged that Farmer was hired by Aramco "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia" (T 2). Farmer claimed that he was wrongfully discharged prior to the end of this period (T 2) and that in almost six years after his discharge by Aramco, he earned almost nothing (R II-179 *et seq.*[3]).

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[2] Increased from $4,000 by amendments to the original complaint.

[3] Reference to Volume and page of record on appeal to the Court of Appeals for the Second Circuit, as certified by the Clerk of the Court of Appeals.

Aramco by its answer denied that Farmer was hired for the term alleged (T 3), maintained that Farmer was hired for no term, but at will, and that no one in its employ had authority to hire for the term alleged by Farmer. Aramco further maintained that Farmer had been discharged for good cause (T 4).

The case was tried for the first time before Judge Palmieri and a jury, resulting in a disagreement among the jurors. Judge Palmieri then dismissed the complaint as a matter of law, primarily on the ground that the alleged employment contract, being oral, was invalid under the New York statute of frauds (176 F. Supp. 45). Costs of $6,601.08 were then awarded to Aramco, including travel expenses of witnesses, expenses for transcripts of pretrial hearings, examinations before trial and depositions, stenographic fees for daily transcripts of the minutes of the trial, and the costs of making photostats of relevant exhibits (T 8-34). With regard to travel expenses the award included lowest cost first-class air passage round trip between Saudi Arabia and New York for witness Elias Faddoul (Faddoul), the expense of transportation by Aramco plane round trip between Saudi Arabia and New York for witnesses Dr. Robert C. Page (Page) and Marjorie Catherine Swanson, R.N. (Swanson), the lowest cost first-class air passage round trip between Wilmington, Delaware and New York for witness Alice Neal, R.N. (Neal), and the lowest cost first-class air passage round trip between Columbus, Ohio, and New York for witness Dr. Richard L. Meiling (Meiling). The testimony of each of these witnesses was material and necessary for Aramco to rebut Farmer's contentions as hereafter discussed.

Judge Palmieri's decision, dismissing the complaint, was reversed by the Court of Appeals (277 F. 2d 46) and

the case was remanded for a new trial. The Court of Appeals held that the alleged employment contract was not unenforceable under the New York statute of frauds[4]. A petition for certiorari submitted by Aramco was denied by this Court (364 U. S. 824).

Prior to the second trial Aramco made a motion to require Farmer to furnish an undertaking for costs on the basis that Farmer resided outside the jurisdiction and that he might not have sufficient assets in the jurisdiction to satisfy a judgment for costs if Aramco was eventually successful in the litigation. The motion was granted by the Honorable Richard H. Levet of the District Court. Thereafter the action was dismissed by the Honorable Lloyd F. MacMahon of the District Court, for Farmer's failure to furnish the required undertaking. The Court of Appeals reversed the decisions of these two district judges for the reason that to require a substantial security for costs would "put an arbitrary and unbending clog on suits by one of its [United States'] own citizens merely because he does not have the good fortune to live in New York." 285 F. 2d 720, 722 (2nd Cir. 1960).

The case was tried a second time before Judge Weinfeld and a jury. A verdict was returned for Aramco.

The clerk of the court thereafter taxed costs of $11,900.12 for Aramco's expenses on both the first and second trials (T 35, *et seq.*). On motion by Farmer, Judge Weinfeld reduced this amount to $831.60, limiting to $16.00 for both the first and second trial the amount taxable for the travel expense of each Aramco witness to and from the place of trial. Judge Weinfeld also disallowed *in toto* certain costs taxed by Judge Palmieri on the first trial,

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[4] The Court of Appeals reversed itself on this point just 3 years later in *Perrin* v. *Pearlstein*, 314 F. 2d 863 (C. A., 2nd Cir. 1963).

including expenses for transcripts of pre-trial hearings, examinations before trial and depositions, stenographic fees for daily transcripts of the minutes of the first trial, and the expenses of making photostats of relevant exhibits, and refused to tax costs incurred on the second trial for similar expenses. (T 53, *et seq.*; 31 F. R. D. 191).

With regard to transportation of witnesses Judge Weinfeld held that costs were allowable at 8¢ per mile for only 100 miles to and from the place of trial for both witnesses transported to and from New York on Aramco's own planes and witnesses transported to and from New York by commercial airline. Specifically Judge Weinfeld reduced to $16.00 the cost, assessed at $1,531.50 by Judge Palmieri, of transporting Faddoul by commercial airline from and to Saudi Arabia for the first trial; reduced to $16.00 respectively for each witness the cost, assessed by Judge Palmieri at $1,032.00 for each witness, of transporting Page and Swanson from and to Saudi Arabia on Aramco planes for the first trial; reduced to $16.00 the cost, assessed by Judge Palmieri at $21.46, of transporting Neal by commercial airline from and to Wilmington, Delaware for the first trial; reduced to $16.00 the cost, assessed by Judge Palmieri at $74.25, of transporting Meiling by commercial airline from and to Columbus, Ohio for the first trial; and limited in each case to $16.00 the cost on the second trial of transporting by commercial airline Faddoul from and to Beirut, Lebanon, Dr. Frank Born (Born) from and to Saudi Arabia, Swanson from and to Tacoma, Washington, Neal from and to Wilmington, Delaware and Meiling from and to Columbus, Ohio (T 61, *et seq.*).

In his opinion Judge Weinfeld did not find the witnesses' presence at trial unnecessary but placed particular emphasis on the "great disparity in the financial resources

of the parties" and limited Aramco's travel expenses for witnesses because Aramco was a "rich litigant" (T 54, 55; 31 F. R. D. 193, 194).

Judge Weinfeld also concluded that Aramco was extravagant in transporting live witnesses to trial, that the cost of obtaining the personal attendance of the witnesses was disproportionate to the financial amounts involved in the litigation and that Aramco was unreasonable in using live witnesses rather than depositions (T 54, 57; 31 F. R. D. 193, 195). It will be seen that each of these conclusions is clearly erroneous in light of the sharp and serious factual questions raised by Farmer's claims and resolved against Farmer by the jury.

B. Farmer's Claim as to the Reason for his Discharge.

Farmer claimed that he was discharged because he insisted "on reporting honestly and truthfully and in accordance with his conscience the results of his findings of trachoma" (R II-1007). Trachoma is a dread eye disease common in tropical climates. It leads to blindness and there are many horrifying examples of it among the natives in Saudi Arabia (R II-98, *et seq.*).

Farmer claimed that an alarming number of American personnel employed by Aramco in Saudi Arabia were contracting this disease (R II-102, *et seq.*). He claimed that Aramco's Medical Director (Page) and Associate Medical Directors (Allen and Born) "bullied or badgered or intimidated [me] into falsifying or suppressing my findings" (R II-1013; see R II-102, *et seq.*) and that he was discharged because he refused to do so. Farmer claimed that the reason he was badgered by the doctors who were his superiors was to protect the company financially from workmen's compensation claims and from the consequent deterrent in obtaining American personnel to work in Saudi Arabia.

Aramco maintained that American personnel in Saudi Arabia were not contracting trachoma and that its doctors, contrary to Farmer's testimony, had always urged Farmer to make truthful diagnoses (see R II-789, *et seq.*). Furthermore Aramco established it had spent over $500,000 on research studies on trachoma. (See R I-130, R II-222, 223).

The gravity of Farmer's claim is readily apparent. A factual situation was alleged where a dread eye disease causing blindness was occurring among American personnel employed by Aramco in Saudi Arabia and that not only was Aramco doing nothing to prevent the spread of trachoma or to cure the personnel so afflicted but that Aramco was wilfully suppressing and falsifying the facts with reference to it. It was therefore essential that Aramco produced the witnesses at trial who could testify that Farmer's charges concerning trachoma were completely baseless. Those witnesses were Aramco's Chief of Surgery, Dr. Lohnaas, Aramco's Medical Director, Dr. Page, Aramco's Associate Medical Director, Dr. Allen, and Aramco's Assistant Medical Director, Dr. Born.

In addition, Farmer's allegations regarding trachoma seriously questioned the professional competence and integrity of Doctors Lohnaas, Allen, Page and Born. Farmer's accusation with reference to these doctors was that they attempted to badger and intimidate him into making false diagnoses. Farmer's lawyer stated in his summation:

> "We are shouting it from the housetops. Dr. Farmer was discharged because he wouldn't be bullied and intimidated into abandoning his conscience and falsifying and suppressing reports, and I don't want there to be any mistake about this being a suggestion. This is the reason and the sole reason and the only reason why Dr. Farmer was discharged." (R II-1008).

To rebut this charge it was essential that Dr. Lohnaas, Dr. Page, Dr. Allen and Dr. Born testify at trial where their credibility could be weighed against that of Farmer.

Judge Weinfeld's conclusion that Aramco was extravagant in transporting live witnesses to trial in that the cost was disproportionate to the financial amount involved in the litigation must be assessed on the basis of the foregoing facts. If Farmer had sued for only a nominal sum, Aramco would have been required and fully justified, whatever the cost, to disprove Farmer's charges: (1) that trachoma was prevalent among its American personnel in Saudi Arabia; (2) that Aramco urged Farmer to falsify his reports; (3) that its chief medical officers had urged Farmer to make false diagnoses and (4) that Farmer had been discharged for his refusal to make such false reports and diagnoses. These are extremely serious allegations, and the reasonableness of witnesses' travel expenses incurred in disproving them cannot be measured solely by the amount sued for—even though that amount was not small, $160,000.00.

C. Aramco's Claim as to the Reason for Farmer's Discharge.

Aramco maintained that Farmer was discharged because he performed a non-emergency operation under general anesthesia on a 4½ year old Arab boy without having first received the results of a blood count and urinalysis. Aramco maintained that the blood and urine had been taken and that the tests were in process but that Farmer refused to wait a few minutes for the results and continued with the operation in an excited and angry condition (e.g., R II-583 [Swanson]). Aramco maintained that this violated not only an express rule of the hospital (R II-233, *et seq.* [Neal]) but accepted standards of medical practice

(R II-833, *et seq.*). Aramco maintained that this was the true reason Farmer was discharged (R II-272 [Page]).

At his examination before trial, Farmer admitted that he had performed the operation without having received the results of these tests but stated that the results were not necessary since he could tell by looking at the boy that he was in good health (R II-148, *et seq.*). He denied the existence of the express rule of the hospital and that such tests were required by accepted standards of medical practice (R II-151, *et seq.*). Farmer also attempted to prove that Aramco's hospital generally fell short of any such accepted medical standards since it was not yet accredited (R II-405).

In preparation for Farmer's contentions Aramco retained an expert, Dr. Joseph F. Artusio (Artusio), Anesthesiologist in Chief at New York Hospital, Cornell University Medical Center, and Professor of Anesthesiology at the Cornell University Medical College. He testified that such tests were indispensable in conducting an operation under general anesthesia and that to conduct such an operation without them could create a hazard to the patient's life (R II-838). In addition, Aramco offered the testimony of the head nurse of the operating room (Nurse Neal, R II-233) and its Chief of Surgery (Dr. Lohnaas, R II-442) to the effect that a specific rule of the hospital in Saudi Arabia required such tests and that the rule was on the bulletin board outside the operating room. It also produced Dr. Meiling, Associate Director of the Ohio State University Health Center and University Hospital in Columbus, Ohio, where Farmer received his training. Dr. Meiling testified that such a rule existed in that hospital at the time Farmer was there (R II-397) and that Farmer had physically received and signed for a copy of this rule as a condition to the receipt of his pay (R I-619). He also testified to events

occurring at that time indicating Farmer's instability (R I-620, *et seq.*).

During the first trial of this action Farmer, apparently realizing he could not defend the testimony he had earlier given in his examination before trial, for the *first time* testified that he had received the results of the blood count and urinalysis prior to conducting the operation on the Arab boy (R I-110). When asked from whom he received the results he gave the name of a Lebanese nurse employed by Aramco in Saudi Arabia, Mr. Elias Faddoul (R I-116).

Aramco had no choice but to contact Faddoul to see if this *new* testimony was true. Faddoul advised that he had not given Farmer the results of the tests (R I-1210). Note that the *first time* Faddoul's name was mentioned by Farmer was during the course of the first trial (R I-116). This made it necessary that Aramco immediately have Faddoul transported to New York to testify that he had not given the results of those tests to Farmer (R I-1204). The transportation was by commercial airline.

It most certainly cannot be argued that Faddoul's testimony was not necessary or that his trip could have been avoided. Farmer's own last minute change of testimony made the trip unavoidable. Having put Aramco to the expense of disproving his calculated change of testimony, Farmer should reimburse Aramco for this expense. Judge Palmieri allowed this expense at the first trial in the amount of $1,531.50 (T 33), but Judge Weinfeld reduced it to $16.00. (T. 53, *et seq.;* 31 F. R. D. 191, 195).

At the second trial Farmer revised his testimony *yet again* and said that he was unsure whether Faddoul or *another* nurse had given him the results of these tests (R II-208). Note that on deposition Farmer testified he had not had the results of the tests; at the first trial he

testified Faddoul gave him the results. At the second trial his testimony was as follows:

> "Q. And the contents had been conveyed to you by whom? A. A nurse.
>
> Q. And the name of that nurse? A. This is not definite. I believe it was one individual, and I know, Mr. Bordeau, that you are going to turn to the ....." (interruption by a colloquy between the attorneys for the respective parties and Judge Weinfeld).
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> • • • • • •
>
> "A. (Continuing) It was my impression that it was Elias Faddoul.
>
> Q. Pardon? A. It was my impression that name of the nurse was Elias Faddoul, F-a-d-d-o-u-l.
>
> Q. Isn't it more than your impression that it was Faddoul? Isn't it a fact that you stated that it was Faddoul? A. Now, Mr. Bordeau, you are leading me on the same way as you did before, and I am not going to be led on." (R II-208, 209).

This Court is urged to read R II-148-163 to judge for itself the type of witness Farmer proved to be and the type of claim he made.

Farmer's contradictory testimony on deposition and at the first trial was read and it was once again necessary to call Faddoul from Saudi Arabia. Since Farmer constantly shifted his testimony on crucial points there was no effective way to disprove his changing and serious charges other than by producing the crucial witnesses to testify in person. Aside from the importance of live witnesses in connection with an issue of credibility, it was vital to have live witnesses since it was impossible to predict Farmer's testimony.

Thus, contrary to Judge Weinfeld's conclusion (T 57; 31 F. R. D. 195), there was no way Aramco could counter Farmer's changing testimony without having live witnesses. Aramco could not predict Farmer's testimony and Farmer (without live defense witnesses) was free to say what he chose about events occurring in Saudi Arabia as to which the only witnesses were located in Saudi Arabia or at distant points in the United States. A defendant who failed to produce live witnesses would have been completely victimized by a plaintiff who changed and threatened to change his testimony as to events knowing that the witnesses who were familiar with the truth were at a great distance from the place of trial. A defense counsel who failed to bring such live witnesses where at all possible to the trial would have been unfaithful to his professional obligation to his client.

Nurse Swanson, the anesthetist assigned to the operation in question, testified at both trials that she had refused to participate in the operation without having received the results of the laboratory tests and she testified at both trials that Farmer had stated to her, not that he had had the results of these tests but that he didn't care whether she assisted him or not (R II-583). In this connection Farmer testified at both trials that in substance Nurse Swanson was incompetent as an anesthetist (R I-169, 402; R II-880) and that she had lied concerning what had been said on the day of the operation (R I-399, 405; R II-877, 878). In Farmer's summation considerable time was spent attempting to show that Nurse Swanson lied under oath (R I-1343, *et seq.*; R II-1004, *et seq.*). Nurse Swanson was a vital and important witness whose credibility was vital to the issues in this case, and whose live testimony was both necessary and material.

Dr. Born, Assistant Medical Director of Aramco, testified at the second trial that Dr. Page told him that Dr. Farmer was conducting an operation before receiving the results of a blood count and urinalysis of the patient (R II-531, *et seq.*). Dr. Born testified that he then accompanied Dr. Page to the operating room to find that surgery was already in progress (R II-533) and that it was too late to interfere (R II-542). Dr. Born further testified at the second trial that at the time of Farmer's discharge he admitted he had performed the operation without obtaining the laboratory results, and did so because he did not think it was necessary (R II-524). There could have been no satisfactory substitute for the personal testimony of Dr. Born with reference to these central issues of the case.

Aramco's chief of surgery, Dr. Lohnaas, testified that Nurse Neal reported to him that Farmer was proceeding with the operation without having an anesthetist present (R II-454). Furthermore, Dr. Lohnaas testified that Farmer admitted to him that the results of the tests had not been received prior to the operation (R II-439, 495, 506, 507). Farmer testified in substance Dr. Lohnaas had testified falsely in this respect (R II-872).

Farmer at the second trial (for the *first time*) maintained that the records of the surgery department had been falsified willfully with reference to whether or not the tests had been taken. It was implied that Dr. Lohnaas, Dr. Page and Dr. Born had participated in this fraud (R II-480, *et seq.;* R II-726, 727; R II-804, *et seq.;* R II-992, *et seq.*).

Farmer also testified that at the time of his discharge no reason was given for his discharge. Farmer at the first trial changed the testimony he had given in his examination before trial regarding conversations relating to his discharge and intimated that the discharge was a frameup by

Doctors Page, Born and Lohnaas acting together (e.g.; R I-80 *et seq.;* R I-120 *et seq.;* R II-92 *et seq.*). Hence, the testimony of all three was material and necessary.

A charge that Aramco had falsified its medical records was one which Aramco was obligated to disprove to the best of its ability. It was a charge which Aramco could disprove only by the testimony of the persons involved. Aramco had a duty to the members of its medical staff to clear their reputations from such a grave accusation. The resolution of this issue as well as all other issues rested solely and completely on the credibility of the witnesses.

Aramco also maintained that Farmer had committed a number of other acts which in themselves were sufficient grounds for his discharge. These acts included the slapping of a patient which was testified to by Nurse Neal (R I-444) and denied by Farmer (R I-1266); the conducting of an operation without proper surgical preparation which was testified to by Nurse Neal (R II-246) and numerous other acts such as removing a suture from a patient's eye without general anesthesia (See R I-140 *et seq.*).

D. The Opinion Below.

On the basis of the foregoing facts, the Court of Appeals, sitting *in banc*, reversed and remanded Judge Weinfeld's determination of allowable costs by a 5-4 decision (T 66; 324 F. 2d 359). It held "the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial" (T 69; 324 F. 2d at 362), that "Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial" (T 73; 324 F. 2d at 364), and that a judgment solely for costs is appealable (T 67, 68; 324 F. 2d at 361).

With regard to travel expenses of witnesses, Chief Judge Lumbard, speaking for the court, concluded that "28 U. S. C. §1821, as amended in 1949, provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar" (T 69; 324 F. 2d at 362), that authorities based on the law prior to 1949 were not controlling (*ibid.*), that the subpoena power had "nothing to do with . . . how to allocate the cost" of a witness' appearance at trial (T 70; 324 F. 2d at 363), and that a case-by-case approach is more likely to protect impecunious litigants than a 100-mile limitation (T 71; 324 F. 2d at 363). Further, he found it was absolutely necessary for Aramco to have produced its witnesses on trial, stating:

> "The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense. Judge Weinfeld determined, however, that in view of the heavy expense of producing them in court the defendant should have relied on written testimony taken in advance of trial or, at least, should itself bear the cost of the witnesses' appearance at trial. We cannot agree.
>
> "It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges." (T 72, 73; 324 F. 2d at 364).

Despite this ruling that Aramco's witnesses were absolutely material and necessary, and holding that Judge Palmieri correctly allowed witnesses' actual travel expenses

on the first trial, the majority upheld Judge Weinfeld in limiting travel costs on the second trial to 8¢ per mile for 100 miles to and from the place of trial. Chief Judge Lumbard stated:

> "• • • We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury" (T 71; 324 F. 2d at 363).

By this statement the Court of Appeals apparently affirmed that if Judge Weinfeld limited Aramco's costs, as appears from Judge Weinfeld's opinion, largely on the basis that Aramco was a "rich litigant," this did not constitute an abuse of discretion (T 53, *et seq.*; 31 F. R. D. 191).

While the majority held that the discretion of Judge Palmieri as to the costs on the first trial should have been respected by Judge Weinfeld, they disallowed the costs awarded by Judge Palmieri for Swanson and Page who were transported from and to Saudi Arabia on Aramco's planes in seats that would otherwise have been vacant (T 73; 324 F. 2d at 364). These planes were owned, maintained and operated by Aramco at substantial expense. Aramco submitted a detailed and uncontroverted affidavit to Judge Palmieri showing the extent of this expense and accounting for the incremental costs allocated by Aramco for flying Swanson and Page (T 26, 27). The charges were

substantially less than the lowest first-class air fare available (T 26).

Circuit Judge Clark in his dissent in referring to the disallowance of Swanson and Page's travel expenses, stated:

> "* * * Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees." (T 82; 324 F. 2d at 369).

Summary of Aramco's Argument.

1. *Total travel expenses of material and necessary witnesses should be taxed against the unsuccessful party regardless of the distances the witnesses travelled to and from the place of trial.*

Federal courts are in conflict, and there is a general uncertainty regarding the taxability of travel expenses for witnesses residing more than 100 miles from the place of trial. It is therefore essential that an affirmative rule be adopted for the taxation of such travel expenses, not just that a 100-mile limitation be rejected. It therefore is submitted that the Court should take this opportunity to establish that total travel expenses of material and necessary witnesses must be taxed.

Adoption of this rule would bring the taxation of travel expenses under 28 U. S. C. §1920 in line with the taxation of other expenses under 28 U. S. C. §1920, would be in accord with better reasoned decisions, and would fulfill the practical need of bench and bar for a just, simple and workable rule.

2. No 100-mile limitation on the allowable amount of taxable travel expenses should be applied.

A. The applicable statutes and a substantial body of well reasoned cases support the rejection of a 100-mile limitation on taxable travel expenses.

Federal Rule of Civil Procedure 54(d), together with 28 U. S. C. §1920(3), provides specific authority for allowing taxation of travel expenses of necessary witnesses. There is no indication in either 28 U. S. C. §1920(3) or Federal Rule of Civil Procedure 45(e)(1) that the right to tax travel expenses is limited to the scope of the subpoena power.

The 1949 amendment of 28 U. S. C. 1821, providing witness fees for witnesses from abroad, is specific authority for rejecting a 100-mile limitation on the taxation of such expenses. Cases applying a 100-mile limitation since 1949 have ignored this amendment and are inappropriate bases for continuing a 100-mile limitation.

B. The statutory rule which imposes a 100-mile limitation on the subpoena power is not a proper basis for limiting the amount of taxable travel expenses in cases where a necessary and material witness residing more than 100 miles from place of trial actually appears in person at the trial, regardless of the fact that his testimony by deposition would have been admissible.

A 100-mile limitation on travel expenses is not supported by the rationale of the 100-mile limitation on the subpoena power. The limitation on the subpoena power, set in 1793, was designed to protect witnesses from involuntary court attendance from distances of more than 100 miles. It should never have been related to the taxation of travel expenses of witnesses; and if it ever could have served usefully as any guide whatsoever to a federal

trial court with respect to the taxation of travel expenses, it has now become entirely inappropriate even for that purpose in the age of modern business dealings and jet travel.

The right to use depositions of witnesses residing outside the district and more than 100 miles from the place of trial is intended solely to protect parties from the inability to subpoena witnesses and should not be relied upon as a justification for penalizing parties by a denial of travel expenses where witnesses appear to testify. Rather, the fact that federal courts may tax the substantial costs of taking depositions furnishes authority for taxing the travel expenses of witnesses who, attending court without subpoena, make the taking of depositions unnecessary and contribute to and facilitate the determination of questions of fact at trial.

C. Policy considerations require the rejection of a 100-mile limitation on taxable travel expenses.

A 100-mile limitation on travel expenses seems completely inconsistent and unjustifiable in the absence of any such limitation in the language of 28 U. S. C. §1920 and in view of the fact that substantial necessary expenses, other than travel expenses, have been taxed under 28 U. S. C. §1920 without any artificial limitation.

A 100-mile limitation results, in many cases, in an effective denial of justice to poor litigants.

Rejection of a 100-mile limitation does not represent an approach to the English system of costs, but an affirmation of the rule first established in the United States by a series of well reasoned cases.

A 100-mile limitation, based on the subpoena power, is unrealistic and arbitrary in that it applies whether or not a witness attends under subpoena, and is arbitrary in that it

achieves results which in many instances depend more on the direction than the distance which a witness travels to the place of trial.

3. *Total travel expenses of defendant's material and necessary witnesses should be taxed as costs against the unsuccessful plaintiff where plaintiff or his witnesses testified falsely or where defendant's witnesses had to be transported from distant places to rebut testimony plaintiff or his witnesses changed on trial.*

The right to use depositions does not justify a limitation of travel expenses where, as in this action, the witnesses are either mentioned for the first time on trial or are necessary to rebut changes and threatened changes of testimony regarding sharp questions of fact.

Disregarding a 100-mile limitation under the circumstances of the instant action will not result in a denial of access to courts but will only discourage parties from basing their cases on falsehoods. Penalizing parties for falsehoods by taxing travel expenses against them finds support in Federal Rule of Civil Procedure 37(c), which allows the taxation of all costs including attorneys' fees against the party who unjustifiably refuses to admit the truth of a fact.

4. *It is an abuse of discretion for a federal district judge to limit the amount of witnesses' travel expenses taxed as costs against an unsuccessful party on the basis of the relative financial resources of the parties.*

Denying costs to the richer of two parties merely because of his wealth is in opposition to the concept of equal justice under law. The settlement process also

will be impeded and "strike" suits encouraged if costs are awarded on the basis of the relative financial resources of parties.

The necessary determination of the relative financial resources of litigants would entail the utilization of an unjustifiable amount of court time.

Neither case law nor Federal Rule of Civil Procedure 54(d) and 28 U. S. C. §1920 supports a holding that the fact that a prevailing defendant is sued by a less wealthy plaintiff is proper ground to limit the defendant's costs. Heretofore, courts have only limited a prevailing party's costs for improper conduct.

5. *It is an abuse of discretion for the judge on the second trial to review and reassess the costs taxed by the judge on the first trial, where there have been two trials of an action before different judges of a federal district court and neither trial resulted in a judgment for plaintiff.*

As emphasized by Chief Judge Lumbard, the judge who presides at the first trial of an action has the greater opportunity to assess the necessity of particular costs incurred on the first trial than does the judge presiding at the second trial.

A rule that a judge at the second trial must not interfere with the costs awarded at the first trial avoids the problems presented when one district judge is asked to pass upon the exercise of discretion by another district judge.

6. *The Court of Appeals was in error when it failed to affirm the award of costs made by Judge Palmieri at the first trial on the basis of the incremental costs to Aramco of transporting two necessary and material witnesses to and from the place of trial on its own planes.*

It is improper cost accounting and indeed the negation of proper cost allocation to conclude that since Aramco incurred no immediate out-of-pocket expenses in transporting two witnesses from and to Saudi Arabia on Aramco planes it cost Aramco nothing to provide this transportation.

28 U. S. C. §1821 provides direct authority for allowing Aramco the lowest cost first class commercial air fare for witnesses transported from and to Saudi Arabia on Aramco's own planes. However, Aramco only seeks a lesser amount, the actual cost of this transportation on Aramco planes as computed in accordance with accepted accounting standards.

Denying costs to parties who employ their own facilities in transporting witnesses will encourage wrongly the utilization of more expensive commercial facilities.

7. *The decision of the Court of Appeals which held that a judgment solely for costs is properly appealable should be held to be correct inasmuch as the issues raised require the resolution of basic questions of law.*

The overwhelming weight of authority supports the appealability of a judgment for costs. Certainly such a judgment should be appealable where, as here, fundamental questions are raised regarding the construction of statutes and positive rules of law.

Newton v. *Consolidated Gas Co.*, 265 U. S. 78 (1924), relied on by Farmer in his petition for certiorari, allowed an appeal from a judgment for costs in a situation similar to the instant action and supports the appealability of Judge Weinfeld's decision.

ARGUMENT.

I. Total travel expenses of material and necessary witnesses should be taxed against the unsuccessful party regardless of the distances the witnesses travelled to and from the place of trial.

The state of the law with respect to the allowance to the successful party of the travel expenses of witnesses residing outside the federal district in which the case is heard, and outside a radius of one hundred miles from the place of trial, is at best imprecise. Some federal courts have allowed the total travel expenses of such witnesses to the successful party;[5] others have allowed travel expenses only to a maximum distance of one hundred miles from the place of trial;[6] still others have allowed the expenses of travel within the court district which may be more than 100 miles, or actual mileage travelled in and out of the district up to 100 miles, whichever is greater.[7] Some federal courts have related the matter of taxation of travel expenses of such witnesses with the subpoena power;[8] others have related the taxation of such expenses with the right to take depositions of witnesses residing beyond the subpoena power.[9] Some federal courts have allowed such travel expenses because of the implications of the 1949 amendment to 28 U. S. C. §1821, allowing

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[5] *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 325 F. 2d 994 (C. A., 2nd Cir. 1963).

[6] *Friedman* v. *Washburn Co.*, 155 F. 2d 959, 963 (C. A., 7th Cir. 1946).

[7] *Kemart Corp.* v. *Printing Arts Research Lab.*, 232 F. 2d 897, 904 (C. A., 9th Cir. 1956).

[8] *Id.* at 903.

[9] *Vincennes Steel Corporation* v. *Miller*, 94 F. 2d 347, 349, 350 (C. A., 5th Cir. 1938).

witnesses travel expenses from and to any points beyond the continental limits of the United States;[10] some federal judges have preferred to follow an analogy to the maritime rule whereby taxation of travel expenses in maritime cases is expressly limited by statutory rule to a hundred miles radius from the place of trial.[11]

As of the present, no federal court litigant, plaintiff or defendant, can predict with any degree of certainty whether or not or in what portion he will be awarded travel expenses for witnesses residing beyond 100 miles from the place of trial in the event of success in litigation. And no federal court has any real blueprint to make consistency possible among the various federal courts and to enable the time of the courts to be saved for matters of substance.

The law in this respect, it is respectfully submitted, is in a relatively undeveloped and deplorable state. The matter is all the more compelling now, in the latter half of the twentieth century, when the increased geographic scope of trade and commerce, and the distant residences of parties dealing one with another, the probable need of bringing witnesses from a distance, and the advent of jet travel, make it commonplace in the proper administration of justice to require evidence and testimony of witnesses from far distant states and countries.

In the broad sense this is the problem raised in this case, in its proper setting and background. This portion of the brief is therefore directed to commending for the Court's consideration the adoption of a consistent rule which will resolve the general uncertainty in taxation of travel costs, and which will not only dispose of this case in what we deem a proper manner, but will

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[10] *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. 924, 930 (S. D. N. Y. 1958).

[11] *Farmer* v. *Arabian American Oil Company*, 324 F. 2d at 365, 367 (dissenting opinion of Circuit Judge Smith).

also serve as a simple instruction to federal courts and to the federal bar in the guidance of its clients. It is respectfully submitted that the Court should take this opportunity to establish that total expenses of travel for necessary and material witnesses from anywhere to and from the place of trial must be taxed against the unsuccessful party.

Adoption of this rule would bring the taxation of travel expenses under 28 U. S. C. §1920 in line with the taxation of other expenses under 28 U. S. C. §1920. 28 U. S. C. §1920 provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) *Fees and disbursements for* printing and *witnesses;*
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title." (emphasis added).

All necessary and material expenses which fit within any of the categories of the various paragraphs of 28 U. S. C. §1920 have been consistently held to be fully taxable, except for the confusion which prevails as to the travel expenses of necessary and material witnesses under 28 U. S. C. §1920(3). See, e.g., *U. S.* v. *Kolesar*, 313 F. 2d 835 (C. A., 5th Cir. 1963, Brown, J.) (copies of depositions); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583, 597, 598 (C. A., 2nd Cir. 1961, Lumbard, J.), *cert. den.* 368 U. S. 989, *cert. den.* 370 U. S. 937,

rehearing den. 370 U. S. 965 (1962) (trial transcript); *Pickett* v. *Aglinsky,* 110 F. 2d 628, 632 (C. A., 4th Cir. 1940, Parker, J.) (printing trial record in appendix on appeal); *Freedman* v. *Philadelphia Terminals Auction Company,* 198 F. Supp. 429, 430 (E. D. Penn. 1961, Van Dusen, J.) (reporter's fees for pretrial hearings and arguments).

Thus, in *U. S.* v. *Kolesar, supra,* it was established that the costs of a copy of a deposition, obtained by counsel for his own use in the trial of the case, were taxable against an unsuccessful litigant. The Court of Appeals (Brown, J.) reached this decision on the basis of the necessity of such depositions, stating:

> "What this means, of course, is that someone must determine in the particular context of a specific case just what depositions have been necessary. No one is better equipped for that than the trial Judge. Thus while we reject Judge Hincks' thesis that forbids the cost of a copy of any deposition altogether as a flat inexorable prohibition, we do not by reflex action establish a rule of like rigidity in the opposite direction. On the contrary, we keep it as flexible as the concept of necessity requires. The trial Judge must determine whether all or any part of a copy of any or all of the depositions was 'necessarily obtained for use in the case.' In that evaluation, great latitude and discretion must be accorded the Judge. Reversal will require an abuse of discretion." (313 F. 2d at 840).

There is no reason why a similar rule based on necessity should not apply to the taxation of travel expenses. Subparagraph (3) of 28 U. S. C. §1920, providing for the taxation of "fees and disbursements for * * * witnesses", most surely has the same statutory import and authority as the

other subparagraphs of this same section. If, therefore, the courts uniformly hold that all expenses deemed necessary under these other subparagraphs are clearly and fully taxable as costs, the logic is unmistakably, and it is submitted irrebuttal, that the same ruling should be made with respect to "fees and disbursements for * * * witnesses."

The necessity of having witnesses at a trial is certainly as great as the necessity of obtaining copies of depositions, of providing transcripts of pre-trial hearings and daily trial proceedings and of printing sections of the trial record in appendices in briefs on appeal. Indeed, in cases such as this, live testimony is essential and depositions would not serve as an adequate substitute.

In this action Chief Judge Lumbard emphasized:

> "The witnesses whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense." (T 72; 324 F. 2d at 364).

He significantly stated:

> "It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges. We have had occasion in the past to note the importance of 'live' witnesses in a trial before a jury. See *Arnstein* v. *Porter* 154 F. 2d 464, 469-470 (1946) * * *." (T 73; 324 F. 2d at 364).

And on appeal from the judgment dismissing Farmer's action for his failure to furnish an undertaking for costs Circuit Judge Clark noted:

> "* * * Indisputably the parties are sharply at odds here * * *." (*Farmer* v. *Arabian American Oil Company*, 285 F. 2d 720, 721 (C. A., 2nd Cir. 1960)).

That the same test, the test of materiality and necessity, is required for the taxing of expenses as costs under each of the five subparagraphs of 28 U. S. C. §1920 is affirmatively implied in 28 U. S. C. §1924 which provides:

> "Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

There is nothing in 28 U. S. C. §1924 which indicates that travel expenses can be limited on any basis other than that they are unnecessary. Indeed, even where federal courts have applied an artificial 100-mile limitation (discussed *infra*, page 32) necessity has been the sole criterion in awarding travel expenses. See, *e.g.*, *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d 338, 344 (C. A., 8th Cir. 1950); *Commerce Oil Refining Corporation* v. *Miner*, 198 F. Supp. 895, 897 (D. R. I. 1961); *Bowman* v. *West Disinfecting Company*, 25 F. R. D. 280, 284 (E. D. N. Y. 1960); *Kenyon* v. *Automatic Instrument Co.*, 10 F. R. D. 248, 250, 251 (W. D. Mich. 1950).

The adoption of a ruling requiring taxation of total travel expenses of material and necessary witnesses is not without precedent. This ruling has been reached by courts which have given serious consideration to the general uncertainty existing on the question of travel from beyond 100 miles to the place of trial.

Thus, in *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. 924, 929 (S. D. N. Y. 1958), the late District Judge Dawson found the testimony of a witness to be necessary and therefore taxed the witness' round trip airfare from England, stating

> "Such [100-mile] limitation has been frequently applied to taxation of costs, but seems to have no basis in either the statute or in the realities of modern trials. • • • The real issue is whether • • • [a witness'] testimony was necessary." (Id. at 929).

Similarly in *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 325 F. 2d 994, 995 (C. A., 2nd Cir. 1963), a $150,000 action for negligence and unseaworthiness, it was held *per curiam* that the necessity of having oral testimony from "the one man best equipped to inform the court of • • • [defendant's] version of the facts on which liability hinged" made it an abuse of discretion to deny the defendant the total travel expenses of bringing a witness from Sweden to rebut the testimony of the plaintiff and his witnesses concerning these facts. The Court of Appeals for the Second Circuit (Moore, Friendly and Kaufman, C. J. J.) cited *Farmer* v. *Arabian American Oil Company*, 324 F. 2d 359 (C. A., 2nd Cir. 1963) and stated:

> "• • • There is no need for us to expatiate on the relative ineffectiveness of depositions or interrogatories in controverting eye-witness testimony. Although this is particularly true before a jury, which Nuzzo had demanded, a judge also is far more likely to be impressed by a 'live' witness than by reading or listening to the droning of a deposition; furthermore his observation of the witness' demeanor has an importance as to credibility that we have often stressed. See Dyer *v.* MacDougall, 201 F. 2d 265, 268-69 (2 Cir. 1952) and cases cited • • •." (325 F. 2d at 995, 996).

See also *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959, Dawson, J.); *Moresco* v. *Flota Mercante Grancolombiana, S. A.*, 167 F. Supp. 845 (E. D. N. Y. 1958, Byers, J.); *Knox* v. *Anderson*, 163 F. Supp. 822 (D. Hawaii 1958, McLaughlin, J.).

Even if statute and better reasoned decisions did not commend the taxation of total travel expenses for necessary and material witnesses, practical considerations do so. The difficulties Circuit Judge Clark foresaw for district court clerks faced with applying varying rules in taxing travel costs[12] are easily avoided if necessity is the only criterion for taxing travel costs. This standard has long been successfully applied in awarding other costs under 28 U. S. C. §1920.

Further, the procedure for taxing travel expenses will be greatly simplified, to the benefit of parties and overburdened federal courts if necessity is the only criterion. Indeed, the complex course of litigation regarding costs in the instant action amply illustrates the burdens federal courts and parties may bear in the absence of certainty as to the method of taxing travel expenses.

It is therefore respectfully submitted that the interests of justice, bench and bar require that an affirmative rule be adopted, a rule that total travel expenses of material and necessary witnesses must be taxed against the unsuccessful party.

II. No 100-mile limitation on the allowable amount of taxable travel expenses should be applied.

The submission in Point I above is directed to the juridical and practical need to clear away the confusion, which presently exists in the various federal district and

[12] T 81; 324 F. 2d at 369.

circuit courts with regard to travel expenses, by this Court adopting an affirmative ruling that total travel expenses of necessary and material witnesses must be taxed. This section is addressed to the Court of Appeals' rejection of a 100 mile limitation in the taxation of travel expenses of witnesses.

A. The applicable statutes and a substantial body of well reasoned cases support the rejection of a 100-mile limitation on taxable travel expenses.

Federal Rule of Civil Procedure 54(d) provides in part that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs". 28 U. S. C. §1920(3) provides in part:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> * * * * * *
>
> (3) Fees and disbursements for * * * witnesses * * *"

Despite the broad language of Rule 54 and 28 U. S. C. §1920(3) it was the position of the circuit judges dissenting in this action that the right of federal trial judges to tax travel expenses of necessary and material witnesses is limited by the scope of the subpoena power (or the greater of either the distance travelled within the district or the distance travelled in and out of the district up to 100 miles). Neither statutory language nor legislative history could be cited by the dissenters in support of their position.

As stated by Chief Judge Lumbard:

> "There is not a shadow of a suggestion, * * * in 28 U. S. C. §1920(3) * * *, that the court's power to issue a subpoena has anything whatsoever to do with

what constitutes a recoverable disbursement for a witness." (T 69; 324 F. 2d at 362).

Nor does Federal Rule of Civil Procedure 45(e)(1) or its statutory predecessors,[13] which limit the subpoena power to the court district or 100 miles from the place of trial, "purport to affect the liability of parties for costs". *Vincennes Steel Corp.* v. *Miller*, 94 F. 2d 347, 349 (C. A., 5th Cir. 1938, Holmes, J.); *United States* v. *Sanborn*, 28 Fed. 299, 303 (C. C. D. Mass. 1886; Gray, J.), *rev'd on other grounds*, 135 U. S. 271 (1890); *Prouty* v. *Draper*, 20 Fed. Cas. 13 (No. 11,447) (C. C. D. Mass., Story, J.), *aff'd* 41 U. S. 336 (1842).

To the contrary, the fact that Federal Rule of Civil Procedure 45(e)(1) was adopted subsequent to Admiralty Rule 47, which imposed a 100-mile limitation on taxable travel expenses in admiralty actions, indicates that Rule 45(e)(1) was not intended to create a similar limitation in civil actions; it seems unlikely that the drafstmen would have left the matter to implication. 64 Col. L. Rev. 955, 960 (1964).

The question to be determined therefore is whether it is proper to imply from the *mere existence* of the 100-mile limitation on the scope of the subpoena power that the clear statutory discretion provided by Rule 54(d) and 28 U. S. C. §1920(3) with regard to travel expenses is similarly limited.[14] 64 Col. L. Rev. 955, 957 (1964).

While it is submitted there has never been any merit in implying a 100-mile limitation on taxable travel expenses

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[13] Act of March 2, 1793, c. 22, §6 (1 St. 335); re-enacted in 1875 as Revised Statutes §876 (former 28 U. S. C. A. §654, 42 Stat. 848).

[14] Circuit Judge Smith stated in his dissent that the 100-mile limitation on taxable travel expenses had been "imported" by courts from the territorial limitation on subpoenas (T 75; 324 F. 2d at 366).

from the similar limitation on the subpoena power,[15] there is certainly no merit since the 1949 amendment of 28 U. S. C. §1821 (63 Stat. 65). As Chief Judge Lumbard points out:

> "• • • 28 U. S. C. §1821 as amended in 1949 provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar". (T 69; 324 F. 2d at 362).

The 1949 amendment of 28 U. S. C. §1821 provides in part that:

> "[W]itnesses who are required to travel between the Territories, possessions, or to and from the Continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed".

The sparse legislative history of this amendment indicates that, according to the Department of Justice,[16] the purpose of the amendment was to relieve the financial burden on witnesses traveling from overseas. 64 Col. L. Rev. 955, 957 (1964).

In applying a 100-mile limitation before the 1949 amendment of 28 U. S. C. §1821, federal courts taxed as travel expenses the amount of witness fees provided by 28 U. S. C. §1821 (five cents per mile; e. g., *Vincennes Steel Corporation* v. *Miller, supra*). There is, therefore, every reason to believe that the 1949 amendment to 28 U. S. C. §1821 was also intended by Congress to form a basis for taxing costs; and as this amendment changed witness fees to allow first class air fare for overseas distances obviously greater than 100 miles, it is apparent that amended 28 U. S. C.

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[15] This point is discussed further, page 38 *et seq., infra.*

[16] S. Rep. No. 187, 81st Cong., 1st Sess., p. 2 (1949); reprinted in 1949 U. S. Code Cong. Serv. pp. 1231, 1233.

§1821 directly supports rejection of a 100-mile limitation on travel expenses. Thus in 64 Col. L. Rev. 955, 961 (1964) it is said:

> "If its [Congress'] silence on the 100-mile rule constituted an implicit adoption of the judicial construction of Section 1821 and Rule 54(d) [a 100-mile limitation on taxable travel expenses], why was there such concern about the costs of overseas travel?"

In other cases since the 1949 amendment of 28 U. S. C. §1821 it also has been held that a 100-mile limitation is no longer applicable. *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden, supra.* (round-trip between New York and Sweden); *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd., supra.* (two witnesses from more than 100 miles); *Maresco* v. *Flota Mercante Grancolombiana, S. A., supra.* (one-way to New York from Portland, Ore. and Bogota, Colombia); *Knox* v. *Anderson, supra.* (round-trip between Los Angeles and Honolulu); *Bank of America* v. *Loew's International Corporation, supra.* (round-trip between England and New York). Thus, Judge Dawson concluded in *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. at 930:

> "• • • [I]t would seem that this [100-mile] limitation is no longer realistic and that to impose such limitation in actions such as the present one would be a complete negation of the clear provisions of the statute [28 U. S. C. §1821, as amended in 1949]."

While there have been decisions since the 1949 amendment of 28 U. S. C. §1821 in which a 100-mile limitation for taxable witness fees has been applied[17], Chief Judge Lumbard made it clear that:

[17] See cases cited by Chief Judge Lumbard in *Farmer* v. *Arabian American Oil Company*, 324 F. 2d 359, 362 (C. A., 2nd Cir. 1963).

> "The vast majority of the more recent cases which approve the rule do no more than cite other cases, without considering the reasons which might lend support to it or weigh against it. Those cases decided subsequent to the 1949 legislation give it little or no attention." (T 69; 324 F. 2d at 362).

Nor, it is submitted, did the dissenters in the instant action adequately analyze the effect of the 1949 amendment to 28 U. S. C. §1821. Circuit Judge Smith conceded that the Assistant to the Attorney General, who pointed out to Congress that the purpose of the 1949 amendment to 28 U. S. C. §1821 was to relieve the financial burden of witnesses traveling from overseas[18], was undoubtedly familiar with a pre-existing 100-mile limitation applied by some courts (T 78; 324 F. 2d at 367). See discussion page 35 *supra*.

Furthermore, it would seem that Circuit Judge Smith ignored the normal canons of statutory construction in arguing that it is "anomalous" to maintain that "the Congress which in 1948 confirmed the power of the Supreme Court over costs in admiralty in the face of existing [Admiralty] Rule 47 applying the 100-mile travel cost limit, indirectly rejected * * * [Admiralty Rule 47] a year later by a statute not limited to civil cases (T 78; 324 F. 2d at 367).

No "anomaly" or "rejection" of Admiralty Rule 47 should be found for a normal presumption of statutory construction, that statutes are not repealed by implication,[19] requires that 28 U. S. C. §1821 be construed as not repealing Admiralty Rule 47 (as ratified by 28 U. S. C. §1925), but nothing requires that 28 U. S. C. §1821 be construed as continuing a non-statutory 100-mile limitation in civil cases.[20]

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[18] S. Rep. No. 187, 81st Cong. 1st Sess., p. 2 (1949); reprinted in 1949 U. S. Cong. Serv. pp. 1231, 1233.

[19] 1 Sutherland, *Statutory Construction* §2014 (3rd Ed. 1943) and cases therein listed.

[20] It is to be noted that Admiralty Rule 47 has been disapproved by the Advisory Committee on Admiralty Rules in its recent revision of the rules. See Amendments to Effect Unification of

Circuit Judge Smith also argues that taxing witnesses' travel expenses beyond the 100-mile limit of the subpoena power "creates a different rule for costs in civil cases from that in admiralty." T 74; 324 F. 2d at 365. But as pointed out in 64 Col. L. Rev. 955, 960 (1964):

> "***Judge Smith's argument that the majority was creating different rules for admiralty and civil cases is mistaken, for the rules already were different. Admiralty Rule 47 limits travel costs to 100 miles for *any* witness, while the civil rule Judge Smith favors allows costs for the greater of mileage '*within* the district *or* actual mileage . . . in and out of the district up to 100 miles.'* * *"

Further there is valid reason for the existence of a different rule for civil litigation from that in admiralty in that:

> "In admiralty, litigants have traditionally relied heavily upon depositions, no doubt because of the absence of juries and the common dispersion of potential witnesses throughout the world." (64 Col. L. Rev. at 960).

B. The statutory rule which imposes a 100-mile limitation on the subpoena power is not a proper basis for limiting the amount of taxable travel expenses in cases where a necessary and material witness residing more than 100 miles from place of trial actually appears in person at the trial, regardless of the fact that his testimony by deposition would have been admissible.

The justification of the subpoena power is the recognition that oral testimony is needed on trial to achieve a just verdict. As stated by Mr. Justice Gray in *United States* v. *Sanborn*, 28 Fed. at 302:

Civil and Admiralty Procedure, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Part I (March 1964).

> "The only object of a subpoena is to compel the witness to attend. • • • The examination of the witness in the presence of the tribunal that is to pass upon his testimony is often quite as important to the party against whom he is called as to the party calling him; and the statutes of the United States from the beginning have declared that the mode of proof in the trial of actions at common law shall be by oral testimony, and examination of witnesses in open court, except as otherwise especially provided. Act of September 24, 1789, C. 20 §30 (1 St. 88; Rev. St. §861.)."

But while it was recognized that parties should be allowed to compel witnesses to testify on trial it was also recognized that witnesses should not be compelled to travel unreasonable distances from home and family. Cf. *United States* v. *Sanborn, supra* at 303. In 1793 it was considered unreasonable to require witnesses to travel more than 100 miles to the place of trial when such witnesses resided outside the judicial district where the trial was held. Thus in the Act of March 2, 1793, c. 22, §6 (1 St. 335), it was provided that subpoenas for witnesses in civil actions could run from one district into another only when the witnesses did not live more than 100 miles from the place of trial.

This 100 mile limitation on the subpoena power has remained in effect though it is less difficult today to travel many thousand miles than to travel 100 miles in 1793. The statute of March 2, 1793 was re-enacted in 1875 (Revised Statutes §876, former 28 U. S. C. §654, 42 Stat. 848) and is the statutory predecessor of Federal Rule of Civil Procedure 45(e)(1). *United States* v. *Sanborn*, 28 Fed. at 303; 64 Col. L. Rev. 955, 957 (1964). Basically, therefore, the argument that taxable travel expenses should be limited by the scope of the subpoena power asks this Court to rest its decision on travel expenses, in this age of jet travel,

on the difficulty of traveling more than 100 miles to a place of trial in 1793! Chief Judge Lumbard recognized the anomaly of this situation, stating:

> "• • • As this case well illustrates, a 100-mile limitation is an anachronism in a day when the facility of world-wide travel and the development of international business make the attendance at trial of witnesses from far off places almost a matter of course" (T 70, 71; 324 F. 2d at 363).

Furthermore, it is clear that, as Chief Judge Lumbard held:

> "• • • The fact that a subpoena does not issue because the witness is outside the reach of the court has nothing to do with the problem of how to allocate the cost of his appearance at the trial" (T 70; 324 F. 2d at 363).

An analysis of the rationale for the 100-mile limitation on the subpoena power demonstrates that there is nothing in this limitation which makes it a valid analogy for imposing a similar limitation on travel expenses. Statutes fixing the 100-mile limitation on the subpoena power "do not purport to affect the liability of the parties for costs" (*Vincennes Steel Corporation* v. *Miller*, 94 F. 2d at 349) but were designed solely to protect witnesses against involuntary attendance at federal courts far from their homes. *United States* v. *Sanborn*, 28 Fed. at 303. This protection is unnecessary, and the reason for the 100-mile limitation on the subpoena power vanishes where a witness travels to the place of trial from afar. Thus in imposing a 100-mile limitation on taxable travel expenses of witnesses who come from afar on the basis of the 100-mile limitation on the subpoena power, courts are relying on the 100-mile limitation on the subpoena power in a situation where this limita-

tion has, in effect, been waived by the attendance without subpoena on trial of the persons it was designed to protect! Indeed, the very existence of the subpoena power as a recognition of the need for oral testimony on trial suggests that parties should be rewarded for their efforts in persuading distant witnesses to testify, not penalized by a denial of travel expenses.

Similarly, the rationale for allowing the use of depositions of witnesses residing more than 100 miles from the place of trial does not support the apparent position of Circuit Judge Clark[21] that depositions are to be required to be used in place of live testimony.

The right of a party to use the deposition of a witness residing more than 100 miles from the place of trial (Federal Rule of Civil Procedure 26(d)(3)) is a necessary concomitant to the limitation of the scope of the subpoena power. It was intended solely "to provide a means by which the party may not wholly lose the benefit of * * * [the witness'] testimony, if he cannot, or will not, attend court." See *United States* v. *Sanborn*, 28 Fed. at 303. Thus, the right to use the deposition of a witness residing more than 100 miles from the place of trial in no way justifies a theory requiring that such a deposition be used in the stead of a live witness at the trial. Certainly a statute designed solely to protect parties from the unavailability of witnesses should not be read as a basis for denying parties the necessary protection and right of being able to call live witnesses to support a valid position, and, if successful upon the trial, to recover the travel expenses of such necessary witnesses.

Indeed, the fact depositions of witnesses who reside beyond the subpoena power of the federal court can be used as an alternative to their oral testimony in court furnishes

[21] T 82, 83; 324 F. 2d at 369, 370.

a sound precedent for allowing travel expenses of witnesses beyond a 100-mile limit. Federal judges are empowered to tax against the losing party the necessary expenses of taking the depositions of witnesses who are beyond the subpoena power of their courts. *Ryan* v. *Arabian American Oil Co.*, 18 F. R. D. 206 (S. D. N. Y. 1955, Bondy, J.); *North Atlantic & Gulf Steamship Co.* v. *United States*, 16 F. R. Serv. 30b.41, case 2 (S. D. N. Y. 1951, Sugarman, J.); S. D. and E. D. New York Local Civil Rule 5(a); 4 Moore, Federal Practice, Par. 26.36 (2nd Ed. 1963). There logically can be no reason why federal judges should not be vested with a similar right to tax necessary travel expenses; especially as by producing a witness without subpoena on trial a party may be saving the expense of a deposition, while at the same time aiding the deliberation of the federal court and jury by producing oral testimony for which the deposition would have been a poor substitute.

The taxable cost of taking depositions may be far in excess of the travel expense of bringing the witness to the trial, as the taxable cost of taking the deposition may include not only the travel and other expenses of counsel in going to the place of deposition, but also the cost of stenographic transcripts, and even attorneys' fees, to say nothing of the expenses of the losing party in the travel and other expenditures of his own counsel. E.g., *Bank of America* v. *Loew's International Corporation*, 163 F. Supp. at 929

The Court of Appeals for the Second Circuit reached a decision *per curiam* finding an abuse of discretion in denying a successful defendant the full cost of bringing a witness from Sweden, at least partially on the basis that:

> "* * * [T]he implicit assumption that no substantial expense is involved in obtaining testimony by depositions or interrogatories does not seem founded in

experience." (*Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 325 F. 2d at 996).

Similarly in *Bank of America* v. *Loew's International Corporation, supra,* District Judge Dawson awarded a successful defendant the cost of bringing three witnesses from England on the basis that a like expense would have been entailed and would have been awarded as costs to the defendant had the deposition procedure been instead used. Judge Dawson stated (163 F. Supp. at 929, 930):

> "* * * [I]f, in the present situation, the testimony of the three witnesses in question had been taken by deposition, it is obvious that it would have been testimony which could only have been taken on an open commission with a right of cross-examination by the adverse party. Under those circumstances the Court would have required that the defendant pay the expenses of one of plaintiffs' attorneys to travel to Great Britain for the purpose of participating in the deposition, and could have taxed the expenses and fees of such attorney as costs. S. D. N. Y. Civil Rule 4 [now 5(a)]. See, also, Ryan v. Arabian Oil Co., *supra;* 4 Moore, Federal Practice, Pars. 30.14; 26.36. The expenses of an attorney for each side going to Great Britain for the purpose of taking the depositions would have been at least as great as those involved in bringing the witnesses to this country so that they might testify in person. It has been urged that to tax as costs the bringing of witnesses from far places might greatly increase the costs of litigation. However, the same objection could be made to taking the depositions of witnesses in far places. But one of the great advantages of the present Federal Rules of Civil Procedure is that it enables the parties to discover the facts no matter where they may be. The fact that such discovery may be expensive is not regarded as a reason for curtailing discovery, unless the expense is such that

> it bears no reasonable relationship to the evidence sought to be adduced.

And in 64 Col. L. Rev. 955, 961, 962 (1964) it is stated that:

> "Even when depositions would not be any less effective than live testimony, they may be difficult to obtain, especially when—as in the instant case—the deponent resides in a foreign country. While certain of these expenses may also be taxable in part, the practical problems might in fact result in greater expense than would be entailed by having him testify in person. An *ad hoc* approach would * * * permit evaluation of such considerations * * *."

C. Policy considerations require the rejection of a 100-mile limitation on taxable travel expenses.

Even if Federal Rule of Civil Procedure 54(d), 28 U. S. C. §1920(3) and 28 U. S. C. §1821, as amended in 1949, did not provide convincing authority for rejecting a 100-mile limitation on taxable travel expenses, ample basis exists for such rejection.

Chief Judge Lumbard adverts to the fact that:

> "There is no reason why a judge should be thought less capable of determining a proper allocation of the costs of witnesses' travel expenses than he is of allocating other expenses of trial, such as transcripts, which are committed without artificial limitation to the discretion of the trial judge." (T 71; 324 F. 2d at 363).

There also is no reason why federal judges who are deemed capable of taxing necessary expenses of travel from within 100 miles of the place of trial (e.g., *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d at 344) should not be deemed capable of taxing such expenses with regard to travel from beyond 100 miles from the place of trial.

Indeed, in the absence of any limitation on the taxation of substantial[22] necessary expenses other than travel expenses under 28 U. S. C. §1920, an artificial 100-mile limitation on travel expenses seems completely inconsistent and unjustifiable.

Contrary to Circuit Judge Smith's position (T 75, 324 F. 2d at 365), granting the right to tax necessary travel expenses will not deny parties of moderate means access to the federal courts. Federal judges have long been granted the right to tax necessary expenses other than travel expenses under 28 U. S. C. A. §1920 without any artificial limitation on this right, and there has been no indication that access to the federal courts has in any way been impeded.

Moreover, as Chief Judge Lumbard stated:

> "It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection for the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which the losing party, in the interest of justice, should bear such costs. For example, had the positions in this case been reversed and Farmer been forced to produce witnesses from Saudi Arabia in

[22] See, e.g., *Farmer* v. *Arabian American Oil Co.*, 324 F. 2d 359 (C. A., 2nd Cir. 1963) (stenographic fees, $1,812.30); *Swan Carburetor Co.* v. *Chrysler Corp.*, 149 F. 2d 476 (C. A., 6th Cir. 1945) (charts and drawings, $3,179.80); *Commerce Oil Ref. Corp.* v. *Miner*, 198 F. Supp. 895 (D. R. I. 1961) (stenographic fees, $1,767.90).

> order to defend against unjust charges of Aramco, one could hardly assert the justice of requiring Farmer to pay the costs of producing his witnesses himself, or risk the failure of his defense. Indeed, adherence to a rigid limitation on the taxation of travel expenses is more likely to work to the detriment of litigants with meager financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case" (T 71; 324 F. 2d at 363).

To carry Chief Judge Lumbard's example further, it is apparent that a 100-mile limitation on taxable travel expenses can, in many cases, result in an effective denial of justice to the poor plaintiff or defendant. These individuals may be unable to bear the expense of transporting distant witnesses to trial where there is no possibility of recoupment of the expense, with the result that it may be impossible for them to bring actions or to successfully defend actions which depend upon the testimony of distant witnesses. On the other hand, if the possibility of recoupment existed the poor plaintiff or defendant might be more willing to bear or able to find the means to bear the initial expense of transporting his witnesses to place of trial.

The effect of a 100-mile limitation in denying justice to the poor, it is submitted, far outweighs any adverse effect on access to federal courts that the dissent contends will result from a rejection of a 100-mile limitation.

Circuit Judges Smith and Clark in their dissenting opinions maintained that by holding a 100-mile limitation inapplicable as a restraint on the taxation of travel expenses the Second Circuit was approaching the English system of taxing costs (T 75, 83; 324 F. 2d at 365, 370). Under the English system all necessary expenses of maintaining an action are taxable against the unsuccessful litigant except

that expenses "'incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses' shall be disallowed." Goodhart, *Costs*, 38 Yale L. J. 849, 856 (1929).

Actually the rejection of a 100-mile limitation only is an approach to the system which applies to other costs taxable under 28 U. S. C. §1920,[23] and to the system which a series of well reasoned cases first established in the United States Courts. *The Gov. Ames*, 187 Fed. 40 (C. A., 1st Cir. 1910, Putnam, J.), *cert. denied* 223 U. S. 725 (1911); *Jesse D. Carr Land & Live Stock Co.* v. *United States*, 118 Fed. 821, 824 (C. A., 9th Cir. 1902, DeHaven, J.); *The City of Augusta*, 80 Fed. 297 (C. A., 1st Cir. 1897, Putnam, J.); *Hunter* v. *Russell*, 59 Fed. 964 (C. C. D. Mont. 1894, Knowles, J.); *United States* v. *Sanborn, supra; Anderson* v. *Moe*, 1 Fed. Cas. 844 (No. 359) (C. C. E. D. Mich. 1869, Withey, J.); *Hathaway* v. *Roach*, 11 Fed. Cas. 818 (No. 6,213) (C. C. D. Mass. 1846, Woodbury, J.); *Whipple* v. *Cumberland Cotton Co.*, 29 Fed. Cas. 933 (No. 17,515) (C. C. D. Me. 1844, Story, J.); *Prouty* v. *Draper, supra.*

Prouty v. *Draper, supra*, was the first federal case decided in the United States on the question of expenses of travel for witnesses brought from beyond 100 miles of the place of trial. There Mr. Justice Story held these travel expenses where found to be necessary, were taxable against the unsuccessful litigant. He stated, referring to the Act of September 24, 1789, c. 20, §30, 1 Stat. 88[24], which allowed the testimony of witnesses more than 100 miles from the place of trial to be taken by deposition:

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[23] See the cases listed in footnote 22 *supra.*

[24] The statutory predecessor of Federal Rule of Civil Procedure 26(d)(3).

> "The act is not peremptory that, under such circumstances, the depositions of the witnesses shall be taken and used, but only that they may be taken and used. It is therefore a mere option given to the party who wishes to use the testimony of the witnesses. In many cases the presence of the witnesses in person, and their oral testimony on the stand, may be indispensable to the true exposition of the merits of the case. No deposition would or could meet all the exigencies which might arise from the varying character of the evidence, or the necessity of instant explanation of circumstances not previously known or understood. • • • In my judgment, therefore, there is no ground to say that the full costs of the personal travel and attendance of the witnesses ought not to be allowed in the costs. • • • [Allowing trial courts discretion to tax necessary travel expenses] seems to be putting the whole doctrine upon a sound and rational foundation, and enables the courts at once to accomplish the purposes of justice, and to prevent the accumulation of unnecessary or extravagant expenses". (20 Fed. Cas. at 13, 14).

Similarly in *Hathaway* v. *Roach, supra,* Mr. Justice Woodbury approved the rule allowing taxation of travel expenses beyond 100 miles from place of trial and, referring to the Act of February 28, 1799, c. 19, §6, 1 Stat. 626,[25] which provided witness fees of 5¢ a mile, stated:

> "As I understand this act of Congress of February 28, 1799, it is imperative on this point, and travel has been allowed beyond the line of the state in such cases by my predecessor after full hearing and deliberation. Whipple *v.* Cumberland Manuf'g Co. [Case No. 17,515]". (11 Fed. Cas. at 820).

[25] The statutory predecessor of 28 U. S. C. §1821.

And in *United States* v. *Sanborn, supra,* Mr. Justice Gray analyzed the purpose of Revised Statutes 876 (former 28 U. S. C. §654, 42 Stat. 848),[26] which allowed subpoenas for witnesses to run 100 miles from the place of trial into another district, and concluded:

> "There seems to us to be quite as much reason for taxing the travel of a witness from the place of his residence to the place of trial in the case in which he could not have been summoned as in the case in which he might have been and was not" (28 Fed. at 304).

In contrast with the foregoing well reasoned decisions the cases on which a 100-mile limitation on taxable witness fees is based, *Dreskill* v. *Parish,* 7 Fed. Cas. 1069 (No. 4,076) (C. C. D. Ohio 1851) and *Anonymous,* 1 Fed. Cas. 992 (No. 432) (C. C. S. D. N. Y. 1863), were decided summarily, without any apparent awareness of the earlier contrary decisions and without any analysis of the statutes involved or the reasons for such a limitation. *United States* v. *Sanborn,* 28 Fed. at 303.

Even if the position of the majority of the Court of Appeals in this case were an approach to the English system of taxing costs this provides no reason for denying that right to tax necessary travel expenses which statute and policy demands. Circuit Judge Clark cites[27] 38 Yale L.J. 849, 872-877 (1929) where, after extended analysis of the English system of taxing costs, it is concluded, contrary to Judge Clark's opinion, that the English system does not favor the wealthy but favors the poor.

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[26] Which re-enacted the Act of March 2, 1793, c. 22, §6 (1 Stat. 335) and is the statutory predecessor of Federal Rule of Civil Procedure 45(e)(1).

[27] T 83 n. 2; 324 F. 2d at 370 n. 2.

Certainly there is nothing as a practical matter which commends a 100-mile limitation in its present application. The arbitrariness of this limitation is illustrated by the fact that an unsuccessful party may bear part of the expenses of travel for a witness from outside the district only up to 100 miles, and at the same time bear a much greater expense for travel substantially in excess of 100 miles by a witness within the district. 64 Col. L. Rev. 955, 960 (1964).

Furthermore, with regard to distance traveled within the district by a witness from without, 64 Col. L. Rev. 955, 960, 961 n. 47 (1964) points out that:

> "... for a witness traveling, for example, from Reno, Nevada, to San Diego, California—about 500 miles—, costs would be taxable for about 360 miles; whereas, for a witness traveling the same distance from Arizona or New Mexico costs would be taxable only for about 175 miles."

Because of the oblong shape of the district encompassing San Diego a witness travelling from Reno, near the northern end of the district, travels a far greater distance within the district, hence a greater taxable distance, than a witness travelling West from Arizona or New Mexico.

There certainly can be little justification for a rule which in many cases makes taxable travel expenses depend more on direction than distance traveled to court.

Furthermore, the arbitrariness of a 100-mile limitation is illustrated by the fact that a 100-mile limitation is applied regardless of whether a witness attends with or without subpoena. See, e.g., *Kemart Corp.* v. *Printing Arts Research Lab.*, 232 F. 2d 897, 904 (C. A., 9th Cir. 1956, Stephens, J.); *Spiritwood Grain Co.* v. *Northern Pac. Ry. Co.*, 179 F. 2d at 344. 64 Col. L. Rev. 955, 960 (1964) states:

> "Once the courts determined that costs would be taxable even though the witness attended volun-

> tarily, little justification remained for limiting taxable mileage to the reach of the subpoena power * * *".

Similarly in *Bank of America* v. *Loew's International Corporation, supra,* District Judge Dawson in taxing as costs the round trip air fare of three witnesses brought from England, stated:

> "* * * It is well established that transportation expenses of witnesses will be taxed as costs, even though a witness has not been subpoenaed. Spirtwood Grain Co. *v.* Northern Pac. Ry. Co., 8 Cir., 1950, 179 F. 2d 338; Vincennes Steel Corp. *v.* Miller, supra, 94 F. 2d at page 350; Hansen *v.* Bradley, D. C. Md. 1953, 114 F. Supp. 382; Gallagher *v.* Union Pac. R. Co., D. C. S. D. N. Y. 1947, 7 F. R. D. 208; 20 C. J. S. Costs §228. Therefore, the question as to whether a witness has traveled a distance greater than the distance for which he may be subpoenaed seems to be irrelevant as to determination of the issue." (163 F. Supp. at 929).

It is therefore submitted that the Court of Appeals correctly rejected a 100-mile limitation on taxable travel expenses; a limitation contrary to the clear statutory language of Federal Rule of Civil Procedure §54(d), 28 U. S. C. §1920 and amended 28 U. S. C. §1821, unsupported by the rationale of the subpoena power and right to use depositions, and productive of only the most unjust and arbitrary results.

III. Total travel expenses of defendant's material and necessary witnesses should be taxed as costs against the unsuccessful plaintiff where plaintiff or his witnesses testified falsely or where defendant's witnesses had to be transported from distant places to rebut testimony plaintiff or his witnesses changed on trial.

The theory that the right to take depositions justifies limiting taxable travel expenses to the federal court district or 100 miles from the place of trial falls down completely in this action. The claim in the testimony of Farmer regarding Faddoul, the Lebanese nurse employed by Aramco in Saudi Arabia, was never mentioned by Farmer in his examination before trial. Farmer *first* referred to Faddoul in the course of his testimony on the first trial. Faddoul had to be called from Saudi Arabia to testify in both the first and second trials *solely* because of statements made by Farmer for *the first time* at trial relative to the question as to whether or not Farmer had received the results of a blood count and urinalysis before performing the unprofessional operation for which the jury found he was discharged[28]. Similarly the testimony of Doctors Page, Born and Lohnaas was necessary on the first trial because on the first trial Farmer changed the testimony he had given in his examination before trial regarding conversations relating to his discharge and intimated that his discharge was a frameup by these doctors[29]. And the testimony of Doctors Page, Born and Lohnaas was necessary on the second trial because at the second trial *for the first time* Farmer implied that Drs. Lohnaas, Page, and Born had conspired to falsify wilfully the records of the surgery

[28] See Aramco's Statement of Facts, pages 10-12 *supra*.

[29] See Aramco's Statement of Facts, pages 13, 14 *supra*.

department at Aramco's hospital in Saudi Arabia with regard to whether or not the blood and urinalysis had been taken[30].

Furthermore, due to the unpredictability of Farmer's testimony on trial and his willingness to alter his testimony regarding events in Saudi Arabia when the only witnesses were at a great distance from the place of trial, it is clear that depositions could not have substituted for live witnesses even with regard to the testimony that Farmer did not change or introduce for the first time at trial.

Under these circumstances there can be no justification for denying travel expenses on the basis of the right to use depositions, whatever justification there may be in some commercial litigation where the case does not depend upon the weighing of the credibility of opposing witnesses and no new witnesses are mentioned or fundamental testimony changed for the first time on trial.

In this action Farmer introduced no testimony but his own as to the events in Saudi Arabia and Aramco's witnesses were brought to trial solely to rebut this testimony. The jury in returning a verdict for Aramco must, therefore, have disbelieved Farmer's testimony and instead believed Aramco's witnesses with regard to material aspects of Farmer's case.

The fact that Farmer based his case on falsehoods is a most important consideration in this action. Farmer should not be allowed to avoid the payment of total travel expenses of witnesses transported to New York as a result of and to contradict his false testimony. Indeed, the jury finding that Farmer testified falsely with respect to material facts, irrebuttably demonstrates that Aramco could not

[30] *Ibid.*

rely on depositions but had to prove the true facts by witnesses at trial whose credibility could be weighted against that of Farmer.

The theory that taxing total travel expenses limits access to the federal courts falls down completely where a party bases his case on falsehoods. In such a situation to tax the expenses of necessary witnesses coming from beyond 100 miles of the place of trial will only discourage parties from testifying falsely and basing their cases on falsehoods. It will not discourage parties from litigating honest claims.

The taxation of necessary travel expenses beyond a 100-mile limit where a party bases his case on falsehoods finds supporting precedent in Federal Rule of Civil Procedure 37(c). This Rule provides:

> "*Expenses on Refusal to Admit.* If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made."

In this action Aramco could not have successfully requested an admission from Farmer under Rule 36 that his employment was terminated because of his professional misconduct as Rule 36 applies only to facts which are undisputed and peripheral and here Farmer falsely disputed the facts. *Syracuse Broadcasting Corporation* v. *Newhouse*, 271

F. 2d 910, 917 (C. A., 2nd Cir. 1959, Waterman, J.). However, there seems no reason why federal judges, who in many situations are required to assess even attorney's fees under Rule 37(c) where a party fails to admit truth, should be denied the right to tax total travel expenses of necessary witnesses to and from the place of trial where a party testifies falsely.

Similarly, it is submitted, there appears to be little merit in Circuit Judge Clark's argument (T 82; 324 F. 2d at 369) that the denial to Aramco of security for costs in this action (*Farmer* v. *Arabian American Oil Co.*, 285 F. 2d 720) furnishes precedent for denying travel expenses. No valid basis exists for linking security for costs and travel expenses in this case. While requiring security for costs in some circumstances may prevent an action from being maintained, requiring payment of travel expenses where a party testifies falsely as in this action will only discourage falsehoods.

It is therefore submitted that even if there is any justification for a 100-mile limitation in other cases—which is denied—such is not present in this case; and that in any event it should be held that a 100-mile limitation is inapplicable where, as here, a party testifies falsely or on trial changes or threatens changes in testimony.

IV. It is an abuse of discretion for a federal district judge to limit the amount of witnesses' travel expenses taxed as costs against an unsuccessful party on the basis of the relative financial resources of the parties.

It is apparent that Judge Weinfeld limited the travel expenses of Aramco's witnesses to 100 miles largely on the basis that Aramco was a "rich litigant" in relation to

Farmer (T 54, 55; 31 F. R. D. at 193, 194). This holding of Judge Weinfeld seems, in effect, to have been approved by the Court of Appeals, for the Court of Appeals affirmed Judge Weinfeld's allowance of only sixteen dollars per witness for transporting Aramco's witnesses to New York for the second trial, while at the same time reinstating the actual expense of transporting Aramco's witnesses to the first trial as allowed by Judge Palmieri. Furthermore, the Court of Appeals stated that the presence of Aramco's witnesses at both the first and second trials was "essential" (T 72; 324 F. 2d at 364), but indicated that in certain cases the actual expenses of transporting witnesses to the place of trial can be limited on the basis "of the relative financial resources of the parties" (T 71; 324 F. 2d at 363).

The subsequent holding of the Court of Appeals for the Second Circuit in *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden, supra,* where the Court of Appeals allowed as costs the total expense of transporting a witness to the place of trial from Sweden, supports the supposition that the Court of Appeals in this action failed to reverse Judge Weinfeld's denial of total travel expenses because of the relative financial resources of Aramco.

Nuzzo involved a $150,000 claim for negligence and unseaworthiness against a Swedish shipping line, based on injury to a longshoreman from stowage of cargo on a Swedish vessel, the SS. *Boheme.* Plaintiff, Nuzzo, and two other longshoremen testified as to the condition on board the SS. *Boheme* and the former Chief Officer of the SS. *Boheme,* Lundquist, who had been in charge of the stowage, was flown from Stockholm to rebut this testimony. After trial Nuzzo's complaint was dismissed (304 F. 2d 506, rehearing and rehearing *in banc* denied 304 F. 2d 514) and District Judge Rosling taxed costs against the plaintiff. Judge Rosling limited travel expenses for Lundquist to 8¢ per mile for 100 miles to and from court.

The Court of Appeals reversed this decision *per curiam*, holding it was "an abuse of discretion" for Judge Rosling to have denied defendant the round trip airfare of Lundquist from Stockholm. 325 F. 2d at 995. The Court emphasized that the testimony of this witness was "material and necessary" stating:

> "Lundquist was the only member of the ship's company called to give defendant's version of the condition of the stow, in opposition to Nuzzo and two other longshoremen who testified in his behalf * * *." (*Ibid*).

As the testimony of Aramco's witnesses in the instant action was similarly found to be necessary, the different holdings of the Court of Appeals with regard to Judge Weinfeld's and Judge Rosling's denial of actual travel expenses can be explained only by the fact that Judge Weinfeld, unlike Judge Rosling, adverted to the relative financial resources of the parties. But this adds even more to the confusion, for it would seem that in *Nuzzo* there too was a difference in relative financial resources between the longshoreman plaintiff and the Swedish shipping line.

Most certainly the adoption of a rule that costs of a successful litigant may be limited on the sole basis of relative wealth is supported by neither public policy nor judicial authorities.

A. Policy.

The issue raised by basing costs on the relative financial resources of the parties is not the same as the problem of costs in a suit by a plaintiff in *forma pauperis*. It is admirable to relieve the lot of the poor, but no attempt was made by Farmer, who was earning at least $16,000 a year in Saudi

Arabia, to demonstrate he was a pauper. Nor it would seem was the Court of Appeals or Judge Weinfeld attempting to broaden the law (28 U. S. C. §1915) relieving poor persons of certain litigation costs. Indeed, 28 U. S. C. §1915 does not provide any different basis for ultimate taxation of costs in an action in *forma pauperis* than in any other action. See, e.g., *Perkins* v. *Cingliano*, 296 F. 2d 567, 568 (C. A., 4th Cir. 1961).

What the position of Judge Weinfeld in the case at bar does involve is the *relative* financial resources of parties; the question posed being whether costs should be denied to the wealthier in a suit by the less wealthy.

Fundamental questions in the administration of justice in the federal courts are raised by a holding which will result in the denial of costs to the wealthier of two parties merely because of relative financial resources. It is a basic American legal concept that "equal justice under law" extends to rich and poor alike. Mr. Justice Arthur J. Goldberg pointed out in a James Madison Lecture, given at New York University School of Law on February 11, 1964:[31]

> "Here as in other aspects of equality we derive our constitutional inspiration from the Bible: 'You shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.' [quoting from Leviticus 19:15] Justices of our Court and many state courts take an oath to 'do equal justice to the poor and to the rich.'"

Equal justice is seriously endangered if litigation costs, which may form a substantial portion of any recovery and are an integral part of the achievement of justice, can be determined on the basis of relative financial resources.

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[31] *Equality and Governmental Action*, delivered as the fifth annual James Madison Lecture. 39 N. Y. U. L. Rev. 205, 217 (1964).

A reversal of a holding that costs can be determined on the basis of relative financial resources is further made essential by the unjustifiable effect such a holding will have in encouraging litigation. As Professor Moore emphasizes, "The extent to which actual expenses are allowed as costs can have a significant effect upon encouragement or discouragement of litigation." 6 Moore's Federal Practice, Par. 54.70 [2], p. 1303.

The less wealthy party, secure in the knowledge that in the Second Circuit the relative financial resources of the parties is a factor in determining the allowance of costs, will be encouraged to sue, and to proceed to litigation on even the most unmeritorious claims. Moreover, there can be no doubt that the settlement process will be impeded if costs are awarded on the basis of the relative financial resources of the parties.

"Strike" suits will also be encouraged. The fact that a prevailing defendant may be denied his costs will make it far more likely the less wealthy party can obtain a sizeable settlement for "nuisance value," and thus he will be encouraged to bring unmeritorious actions.

A further practical disadvantage to the assessment of costs on the basis of the relative financial resources of the parties is the fact that this theory can be applied correctly only by requiring full disclosure of the parties' financial resources. This may entail the utilization of an unjustifiable amount of court time, even if it were otherwise proper to require full disclosure of the financial resources of the parties.

B. Authorities.

It has long been the general rule that the successful party is entitled to costs "which are allowed to the successful party by way of amends for his expense and trouble

in prosecuting [or defending] his suit." *Day* v. *Woodworth.* 13 How. (54 U. S.) 363, 372 (1851); 6 Moore's Federal Practice, Par. 54.70[3], p. 1304 (2nd Ed. 1963).

Prior to the Federal Rules of Civil Procedure, in the absence of a statutory provision otherwise specifying, the prevailing party in an action at law was entitled to costs as of right. *Ex Parte Peterson,* 253 U. S. 300, 317, 318 (1920); 6 Moore's Federal Practice, Par. 54.70[3], p. 1304. With the promulgation of Rule 54(d) of the Federal Rules of Civil Procedure discretion was given under 28 U. S. C. §1920 to allow or disallow costs to the prevailing party. However, other than this action, insofar as research has shown, courts have never interpreted Federal Rule of Civil Procedure 54(d) or 28 U. S. C. §1920 to hold that costs could be allowed or disallowed because of the relative financial resources of the parties. Cf. *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F. 2d 1, 11 (C. A., 7th Cir. 1949, Kerner, J.), *cert. denied* 338 U. S. 948 (1950); *Lichter Foundation, Inc.* v. *Welch,* 269 F. 2d 142, 146 (C. A., 6th Cir. 1959, Miller, J.). Indeed, the only criterion mentioned anywhere in 28 U. S. C. §1920 is necessity. 28 U. S. C. §1920(2),(4).

Heretofore federal courts have adhered to the position that "departure from the rule of awarding costs to the prevailing party should only be for good cause." 10 Cyclopedia of Federal Procedure, §38.17, p. 377 (3rd Ed. 1952). Only where the prevailing party has been guilty of some improper conduct in the course of the litigation have costs been denied. As stated by Circuit Judge Kerner in *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F. 2d at 11:

> "While there is no question that, under Rule 54(d), Rules of Civil Procedure, 28 U. S. C. A. which provides: 'Except when express provision

> therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *' the court has discretion over the allowance of costs, we think the facts disclosed did not justify the exercise of that discretion. As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him *is in the nature of a penalty for some defection on his part* in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. [citations omitted] A party, although prevailing, would be denied costs for needlessly bringing or prolonging litigation." (emphasis added.)

The ability of Aramco or any other prevailing party to pay its own costs is certainly not a "defection" for which "a penalty" should be imposed.

In *Lichter Foundation, Inc.* v. *Welch, supra*, a taxpayer won a large judgment against the Collector of Internal Revenue in an action for a tax refund. The taxpayer claimed costs of $2,165.40. However, the District Judge disallowed all costs except $5.00. The taxpayer took an appeal to the United States Court of Appeals for the Sixth Circuit. In its opinion the Court of Appeals, speaking through Judge Miller noted critically that it was the view of the District Judge that "since it was a discretionary matter with the Court and the appellant having recovered a huge judgment could amply afford to pay the costs in the case, he was exercising his discretion in the matter and limiting costs to $5." 269 F. 2d at 146. The Court of Appeals did not agree with this reasoning and reversed the District Court. In the opinion Judge Miller noted, apparently with

approval the argument of the successful appellant "that the allowance of only $5. as costs" instead of "actually expended costs in the approved amount of $2,165.40 is an abuse of discretion." 269 F. 2d at 144.

Similarly it should have been held an abuse of discretion for Judge Weinfeld to have limited Aramco's costs on the basis that Aramco was a "rich litigant."

V. It is an abuse of discretion for the judge on the second trial to review and reassess the costs taxed by the judge on the first trial, where there have been two trials of an action before different judges of a federal district court and neither trial resulted in a judgment for plaintiff.

In this action the Court of Appeals held that "it was an abuse of discretion" for District Judge Weinfeld, in taxing costs after the second trial, to have reduced the costs awarded by District Judge Palmieri on the first trial (T 75; 324 F. 2d at 365). Chief Judge Lumbard stated:

> "As the judge who presided at the first trial, Judge Palmieri had the greater opportunity to assess the necessity of particular costs incurred in defense of the action before him. This circumstance, considered in the light of the sensitive nature of the problems presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial." (T 72; 364 F. 2d at 364).

Similarly, Circuit Judge Smith recognized in his dissent that "great deference should be given by the second judge to the opportunity of the first judge, here Judge Palmieri,

to weigh the situation then before him in assessing necessity." (T 80; 324 F. 2d at 368).

The validity of the conclusion that the judge on the second trial will not be able to weigh the necessity of expenses on the first trial as well as the judge on the first trial is well demonstrated by Judge Weinfeld's opinion. For example Judge Weinfeld stated, regarding costs on the first trial:

> "In the instant case the defendant had taken the plaintiff's pretrial deposition and so was aware of his contentions in support of his claim. It knew the witnesses it would rely upon to rebut his contentions. The testimony of any witness beyond the subpoena power of the Court could have been obtained by way of deposition, open commission, written interrogatories or letters rogatory." (T 57; 31 F. R. D. 195).

Certainly this was not true, as demonstrated earlier in this brief, with respect to the witnesses whose testimony was necessary to rebut testimony Farmer changed for the first time at trial, and at a time when he knew that the only witnesses knowing the truth were far from the place of trial.

Furthermore, while Federal Rule of Civil Procedure 54 (d) allows costs to be taxed in favor of the prevailing party, this only should necessitate a denial of the costs awarded a defendant on the first trial where the second trial, after a reversal on appeal of the verdict or judgment on the first trial, results in a verdict for the plaintiff. Thus courts have allowed the taxation of costs, and even motions seeking a retaxation of costs, while appeals were being considered on the merits. E.g., *Hoeth* v. *Stone*, 240 F. 2d 384, 387 (C. A., 9th Cir. 1957, Barnes, J.); *Independent Productions Corporation* v. *Loew's Incorporated*, 184 F. Supp. 671 (S. D. N. Y. 1960, McGohey, J.).

VI. The Court of Appeals was in error when it failed to affirm the award of costs made by Judge Palmieri at the first trial on the basis of the incremental costs to Aramco of transporting two necessary and material witnesses to and from the place of trial on its own planes.

The majority of the Court of Appeals disallowed the costs taxed by Judge Palmieri for transportation of Page and Swanson round-trip to the place of trial on Aramco planes from Saudi Arabia (T 73; 324 F. 2d at 364). Chief Judge Lumbard gave neither reason nor authority for this result, stating merely:

> "• • • Page and Swanson occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed." (*Ibid.*).

But plainly Aramco did incur travel expense with regard to Page and Swanson. This is the age old problem in industry of incremental and indirect costs. Aramco submitted a detailed, uncontradicted affidavit to Judge Palmieri (T 26) showing the expense incurred by Aramco in maintaining its planes and showing that by proper accounting principles the actual cost of each flight round trip from Saudi Arabia was $1032.00. As stated in 112 U. Pa. L. Rev. 1076, 1081 n. 24 (1964):

> "It is unsophisticated cost allocation • • • to conclude that since Aramco incurred no out-of-pocket expenses it cost nothing to bring these witnesses from Saudi Arabia to New York. The pro rata assignment of air transportation expense by Aramco

> was legitimate and was considerably lower than the corresponding cost of commercial air travel."

Furthermore, even if it had cost Aramco nothing to fly Page and Swanson round trip from Saudi Arabia this is not a proper basis for denying taxable costs. 28 U. S. C. §1821 provides direct authority for allowing Aramco the lowest cost first class commercial air fare for witnesses transported from and to Saudi Arabia, regardless of the expense actually incurred. Aramco should, therefore, be allowed the lesser amount it seeks; the actual cost of transporting witnesses from and to Saudi Arabia on Aramco planes as computed in accordance with accepted accounting standards. As Circuit Judge Clark stated in his dissent:

> "• • • Except on the theory that two wrongs make a right, this [denial of travel expenses from and to Saudi Arabia for Page and Swanson] cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claims for fees." (T 82; 324 F. 2d at 369).

The overwhelming weight of authority supports Judge Clark in this respect. See, e.g., *Kemart Corporation* v. *Printing Arts Research Lab., supra; Spiritwood Grain Co.* v. *Northern Pac. Ry. Co., supra; Vincennes Steel Corporation* v. *Miller, supra.*

Even Judge Weinfeld taxed the same costs for Page and Swanson on the Aramco planes as for witnesses on commercial planes (8¢ per mile for 200 miles), thus recognizing the irrelevancy of whether Aramco had to pay for the

flights of Page and Swanson on the Aramco planes (T 63, 64).

There would seem to be no valid reason for penalizing Aramco with a denial of costs because of Aramco's choice to use a cheaper method of transportation than commercial airlines, and thus, indeed, to reduce the amount that would be taxable. The utilization of the cheapest method of transporting witnesses should be encouraged, not discouraged.

VII. The decision of the Court of Appeals which held that a judgment solely for costs is properly appealable should be held to be correct inasmuch as the issues raised require the resolution of basic questions of law.

It was Chief Judge Lumbard's holding that:

> "* * * [I]t is unquestionably true that the portion of the judgment relating to costs may be reviewed on appeal, for abuse of * * * discretion, if other issues are also raised. See e.g., Chemical Bank & Trust Co. *v.* Prudence-Bonds Corp., 207 F. 2d 67 (2 Cir. 1953), 347 U. S. 904, 74 S. Ct. 429, 98 L. Ed. 1063 (1954); Chicago Sugar Co. *v.* American Sugar Refining Co., 176 F. 2d 1 (7 Cir. 1949), cert. denied 338 U. S. 948, 70 S. Ct. 486, 94 L. Ed. 584 (1950). We see no reason why we should not hear an appeal from this element alone. It is surely a final judgment within the meaning of 28 U. S. C. §1291. See Donovan *v.* Jeffcott, 147 F. 2d 198 (9 Cir. 1945). We hold that when, as here, the question is not whether the district judge should have allowed or disallowed particular items of costs, but is rather whether he exceeded, and therefore abused, his discretion, a judgment solely for costs is appealable. Lichter Foundation, Inc. *v.* Welch, 269 F. 2d 142 (6

Cir. 1959); Kemart Corp. *v.* Printing Arts Research Laboratories, 232 F. 2d 897 (9 Cir. 1956); Prudence-Bonds Corp. *v.* Prudence Realization Corp., 174 F. 2d 288 (2 Cir. 1949); Harris *v.* Twentieth Century-Fox Film Corp., 139 F. 2d 571 (2 Cir. 1943); 6 Moore, Federal Practice 1309 (1953).'"[32] (T 67, 68; 324 F. 2d 361, 362.)

Newton v. *Consolidated Gas Co.*, 265 U. S. 78 (1924), the principal case in this regard relied on by Farmer in his petition for certiorari, though distinguishable[33], is authority for the proposition that an appeal will lie from a judgment solely for costs. This Court there dealt with a discretionary award of costs and a conflict between various circuits regarding whether the premiums on surety bonds were taxable as costs.

Similarly, the instant action deals with the taxability of travel expenses beyond the scope of the subpoena power, a question as to which various courts are in conflict, and involves an abuse of discretion by Judge Weinfeld in failing to adhere to the costs awarded by Judge Palmieri on the first trial, as well as the other questions dealt with in this brief.

Moreover, the fundamental questions of law raised in this case concerning the construction of statutes and the effect of positive rules of law should be determined and resolved on appeal regardless of whether costs in the usual situation are appealable. See *The City of Augusta*, 80 Fed. at 303.

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[32] This holding is clearly correct. See, e.g., 64 Col. L. Rev. 955, 958 n. 29 (1964) and cases therein cited.

[33] *Newton* v. *Consolidated Gas Co., supra*, is distinguishable both in that it was decided prior to the adoption of Federal Rule of Civil Procedure 54(d) and that it was an equity action where, unlike the case at bar, the award of costs was not based on statutes.

Conclusion.

The judgment of the Court of Appeals for the Second Circuit should be remanded with instructions to allow all costs taxed by Judge Palmieri on the first trial, and to allow as costs the total round-trip travel expenses incurred by Aramco in transporting witnesses to the second trial.

Dated: August 24, 1964.

Respectfully submitted,

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Appendix.

Rule 26. Depositions Pending Action.

* * * * * *

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition of or that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; and that the party offering the deposition has been unable to procure the attendance of the witness by subpœna; or 3, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 37. Refusal to Make Discovery: Consequences.

* * * * * *

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred

in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

RULE 45. SUBPOENA.

* * * * * *

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

RULE 54. JUDGMENTS; COSTS.

* * * * * *

(d) COSTS. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C.

§1821. PER DIEM AND MILEAGE GENERALLY: SUBSISTENCE

A witness attending in any court of the United States, or before a United States commissioner, or before any

person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of $8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

§1915. PROCEEDINGS IN FORMA PAUPERIS

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

§1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

§1924. Verification of bill of costs

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

§1925. Admiralty and maritime cases

Except as otherwise provided by Act of Congress, the allowance and taxation of costs in admiralty and maritime cases shall be prescribed by rules promulgated by the Supreme Court.

The Act of September 24, 1789, c. 20, §30 (1 Stat. 88)

Sec. 30. *And be it further enacted*, That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before

any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a dis-

trict court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided,* That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess, nor to extend to depositions taken in *perpetuam rei memoriam,* which if they relate to matters that may be cognizable in any court of the United States, a circuit court on application thereto made as a court of equity, may, according to the usages in chancery direct to be taken.

THE ACT OF MARCH 2, 1793, c. 22 §6 (1 Stat. 335)

SEC. 6. *And be it further enacted,* That subpœnas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district: *Provided,* That in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same.

Appendix.

THE ACT OF FEBRUARY 28, 1799, c. 19, §6 (1 Stat. 626)

SEC. 6. *And be it further enacted,* That the compensation to jurors and witnesses, in the courts of the United States, shall be as follows, to wit: to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like allowance for returning; to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors.

NEW YORK SOUTHERN AND EASTERN DISTRICT LOCAL CIVIL RULE 5(a)

When a proposed deposition upon oral examination, including a deposition before action, or pending appeal, is sought to be taken at a place more than 100 miles from the courthouse, the court may provide in the order therefor, or in any order entered under Rule of Civil Procedure 30(b), that prior to the examination the applicant pay the expense of the attendance at the place where the deposition is to be taken of one attorney for each adversary party, or expected party, including a reasonable counsel fee. The amounts so paid shall be a taxable cost in the event that the applicant recovers costs of the action or proceeding.

ADMIRALTY RULE 47

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 33

ARABIAN AMERICAN OIL COMPANY,

Petitioner,

against

HOWARD FARMER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Certain statements contained in respondent's answering brief suggest some reply.

I.

At pages 3, 4 and 5 of his answering brief, respondent takes issue with petitioner's use of the words "rich litigant" appearing at pages 7 and 8 of petitioner's main brief, where petitioner stated:

> "In his opinion Judge Weinfeld did not find the witnesses' presence at trial unnecessary but placed particular emphasis on the 'great disparity in the financial resources of the parties' and limited Aramco's travel expenses for witnesses because Aramco was a 'rich litigant' (T 54, 55; 31 F. R. D. 193, 194)."

At pages 55 and 56 of its main brief, petitioner stated:

> "It is apparent that Judge Weinfeld limited the travel expenses of Aramco's witnesses to 100 miles largely on the basis that Aramco was a 'rich litigant' in relation to Farmer (T 54, 55; 31 F. R. D. at 193, 194). This holding of Judge Weinfeld seems, in effect to have been approved by the Court of Appeals, for the Court of Appeals affirmed Judge Weinfeld's allowance of only sixteen dollars per witness for transporting Aramco's witnesses to New York for the second trial, while at the same time reinstating the actual expense of transporting Aramco's witnesses to the first trial as allowed by Judge Palmieri. Furthermore, the Court of Appeals stated that the presence of Aramco's witnesses at both the first and second trials was 'essential' (T 72; 324 F. 2d at 364), but indicated that in certain cases the actual expenses of transporting witnesses to the place of trial can be limited on the basis 'of the relative financial resources of the parties' (T 71; 324 F. 2d at 363)."

It is a fact that Judge Weinfeld quoted from an earlier opinion of the Court of Appeals (285 F. 2d at 722) as conceded by respondent at page 3 of his answering brief. The Court of Appeals on that appeal involving the dismissal of the action for the failure of respondent to file a bond for costs as ordered by the district court, stated:

> "Defendant, with its rich resources may well wish to try the case expensively, but it does not seem just that it should force plaintiff without such resources to guarantee payment therefor in advance." (285 F. 2d at 722).

The Court of Appeals in its opinion (324 F. 2d 359; T 66, *et seq.*) from which both parties petitioned for review by this Court, now under consideration stated (T 71):

> "In exercising that discretion [in the allowance of costs], the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith."

It is submitted that the use of the words "rich litigant" by petitioner in its petition, pages 7, 8, 55 and 56, was not inappropriate.

The fact is that the Court of Appeals stated that the comparative wealth of the parties was a factor to be taken into consideration in the exercise of discretion by a trial court in the awarding of costs.

At page 4 of his answering brief, respondent refers to the fact that Judge Palmieri, in reviewing the taxation of costs after the first trial allowed expenses ($17.60) in obtaining a copy of the oral argument before Judge Weinfeld on a motion for summary judgment, although Judge Weinfeld had not requested or indicated that he was interested in obtaining a copy of counsel's argument. The fact is that Judge Palmieri, in allowing this item of cost, stated in his opinion, dated December 10, 1959 (T 29):

> "Plaintiff objects to the charges for transcripts of the minutes of three pre-trial hearings. In view of the nature and extent of these conferences and the importance of the rulings which were entered, I am of the opinion that it was necessary to have a full record of the arguments, stipulations, and rep-

> resentations made by counsel. Since I have concluded that the transcripts were essential to a proper understanding of matters covered at the conferences and that reliance on memory and notes would have placed a severe burden on the Court as well as counsel, I exercise my discretion to allow these costs as taxed by the Clerk."

The minutes, as indicated to Judge Palmieri, were used in an argument before the court as to what statements had been made by counsel for respondent in the argument before Judge Weinfeld. Judge Palmieri's allowance of this item was disallowed by Judge Weinfeld but was reinstated by the Court of Appeals.

At page 4 of his answering brief, respondent, in a long footnote numbered 4, refers to the taking of the deposition before trial of Lester Miles Snyder from Saudi Arabia and suggests that the testimony of J. C. McDonald in New York should have been produced. Respondent makes no reference to the record as required by the Rules of this Court. Rule 40.1 and .2. By this reference, respondent suggests that the expenses of Mr. Snyder on his trip from Saudi Arabia to New York were an objectionable item of cost. The fact is that *Mr. Snyder's expenses* were not incurred until after the first trial and before the second trial and *were not taxed.*

Mr. Snyder's testimony was given pursuant to the order of Chief Judge Sylvester Ryan, dated June 17, 1960, at

which time respondent made a motion which was granted to amend his complaint to increase the amount of alleged damages to $160,000. This order required, among other things, that petitioner

> "by an executive officer shall submit to an examination by plaintiff with respect to the authority of Dr. Allen to make the contract claimed by plaintiff in his complaint;" (T 6).

Mr. Snyder was produced by defendant because he was the executive officer of respondent who had general supervision of the hiring of employees who were expected to work in Saudi Arabia, such as Dr. Farmer. Mr. McDonald and Dr. Allen in New York were under his supervision with respect to the hiring policies and the general terms and conditions of employment of such employees. Of course, Mr. Snyder was not familiar with what actually occurred between Dr. Farmer and Dr. Allen. That testimony was available in New York from Dr. Allen, who had been examined extensively by respondent.

Mr. Snyder's testimony was that he knew nothing about the hiring of Dr. Farmer or the circumstances under which he was hired. He did not testify, as stated by respondent at page 7 of his answering brief, that he (Mr. Snyder) knew nothing about the authority of Dr. Allen to hire medical personnel to work in Saudi Arabia, such as Dr. Farmer.

Of course, Mr. McDonald was in New York and could have been examined by respondent at any time. When Mr. Snyder was examined it was suggested by respondent that Mr. McDonald should have been produced, the court suggested that respondent might want to withdraw the examination of Mr. Snyder (pages 35, 94 of pretrial examination of Mr. Snyder) but the suggestion was ignored and respond-

ent conducted an extensive examination (94 pages) of Mr. Snyder. Mr. McDonald's attendance was not thereafter requested and while he could have been subpoenaed before or at the trial, respondent never availed himself of that opportunity.

II.

At pages 5, 6, 7 and 8 of his answering brief, respondent states that petitioner argues on alleged incorrect assumptions that (i) respondent's case was based on testimony concerning events occurring in Saudi Arabia which petitioner was required to rebut; and (ii) that the necessary effect of the jury verdict was a determination that respondent had testified falsely.

The only event which occu ed in New York was the meeting between Dr. Allen and Dr. Farmer, at which time Dr. Farmer was hired to work in Saudi Arabia for petitioner as an ophthalmologist. Dr. Allen testified with respect to that hiring and contradicted Dr. Farmer's statement that the term of his employment was for the duration of defendant's operation of its oil wells in Saudi Arabia. All other material events occurred in Saudi Arabia and they had to do with the performance of Dr. Farmer's work in Saudi Arabia and the events occurring prior to his discharge by petitioner. Dr. Farmer had claimed that he had been discharged for having reported truthfully alleged findings that many American employees of petitioner in Saudi Arabia were contracting trachoma, a tropical disease which leads to blindness. He claimed that his superiors had sought to intimidate him into suppressing his findings. The charges of Dr. Farmer were characterized by Chief Judge Lumbard (T 73):

> "It is difficult to imagine a more serous charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges."

Petitioner claimed that Dr. Farmer had been discharged for just cause, specifically that he had performed a non-emergency operation in violation of an express rule of the hospital and of accepted standards of medical practice in that he had failed to secure the results of blood and urinalysis tests before performing the operation under general anesthesia.

Witnesses from Saudi Arabia were required to attend in New York to meet Dr. Farmer's serious charges against petitioner.

Respondent in his answering brief at page 5, footnote 5, states:

> "Defendant twice formally amended its answer, first to plead the statute of frauds and next on the call of the trial calendar after all examinations and preliminary proceedings had been concluded and the case was called for trial, to plead just cause for plaintiff's discharge. Thereafter, after plaintiff's counsel had opened his case to the jury, defendant injected a third defense, that no one in defendant's employ had authority to hire for the term alleged by the plaintiff."

These statements are simply untrue.[1]

An amended answer (T 3, 4) to the original complaint was filed on April 21, 1958 (see docket of Clerk of United States District Court). In that amended answer, filed over a year before the commencement of the first trial on May 11, 1959, there are two defenses alleged, i.e., the statute of frauds and

> "If and in the event that it is found that plaintiff was employed by defendant for a term, defendant alleges that it terminated plaintiff's employment for good cause."

These two defenses were asserted pursuant to leave granted by orders of the district court dated March 20, 1958 and April 15, 1958.

On June 17, 1960 (T 6 and 7), after the first trial, respondent made a motion which was granted, to amend his complaint to increase the amount sought to be recovered to $160,000. It was pursuant to this order of Chief Judge Ryan that plaintiff was permitted to take the testimony of Mr. Lester Miles Snyder in September 1960, referred to hereinabove at page 5.

It also is stated by respondent in his answering brief that it was after plaintiff's counsel opened his case to the jury (he does not say whether this occurred at the first or second trial) that defendant injected a third defense that no one in defendant's employ had authority to hire for the term alleged by plaintiff. This simply is not true and

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[1] The original complaint sought to recover $4,000. It was served in June 1956. At the commencement of the first trial before Judge Palmieri (May 11, 1959) respondent amended his complaint to recover $59,683 (T 1 and 2).

respondent in his answering brief has not made reference to the record in making this statement.[2]

There was evidence produced by petitioner with respect to the fact that no one in its employ had authority to hire for the term alleged by respondent. Such evidence was adduced from witnesses from New York and from Saudi Arabia. These witnesses also testified that no one has such a term contract.

At page 6 of his answering brief, respondent states that he was discharged on the "narrowest of technicalities" in connection with which defendant called witnesses

> "from far-off places, one, an expert, to testify with much solemnity about the serious consequences attendant upon failure to comply with such rule, and, another, the head of a hospital at which plaintiff had previously been employed, to testify plaintiff had acknowledged, while there, receiving a set of rules which included a rule similar to the one in question, and that plaintiff had been guilty of neurotic behavior at his former place of employment."

The fact is that the expert who was called to testify about the existence of the rule and its acceptance as a standard of medical practice in the medical profession and about the serious consequences that might follow the failure to comply with such rule and standard, was Dr. Joseph F. Artusio, Jr., Anesthesiologist in Chief at New York Hospital, Cornell Medical Center and Professor of Anesthesiology at the Cornell University Medical College, located at 525 E. 68 St., New York, N. Y. The other witness and expert, Dr. Richard L. Meiling, Associate Director of the

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[2] See Rule 40.1(e) and .2 of Rules of the Supreme Court of the United States. The same objection is applicable to other portions of respondent's answering brief and to the statements contained in the first paragraph on page 6 of petitioner's brief in No. 32 (804). Such statements should be disregarded.

Ohio State University Health Center and University Hospital, where plaintiff had been a resident in ophthalmology for three years, came from Columbus, Ohio. Plaintiff at first had denied the existence of any such rule in the medical profession and it became important to establish definitely that such a rule existed and that plaintiff personally was aware of it.

III.

At page 2 of his answering brief, respondent states:

> "We shall therefore move for a dismissal of defendant's cross-appeal."

Respondent does not raise any questions with respect to question 1 presented by petitioner here (Aramco). Respondent concedes that questions 2, 5, 6 and 7 presented by petitioner here deal with the same issues presented by respondent as petitioner in No. 32. With respect to questions 3, 4 and 6, he concedes that they are encompassed within his question 2 in No. 32. He argues that petitioner's questions 3 and 4 are improperly before the Court in that question 3 is founded on an alleged incorrect statement of fact and in that petitioner's question 4 is based on an issue not present in this case and is based on a statement incorrectly attributed to the courts below.

Petitioner's question 3 in No. 33 is encompassed within respondent's question 1 in No. 32. Petitioner's question 4 in No. 33 is the specific question presented in petitioner's petition which was granted by this Court. Petitioner's question 6 clearly comes within question 2 presented by respondent in No. 32.

Petitioner's brief in No. 33 discusses and answers the questions presented by respondent as petitioner in No. 32 and the arguments contained therein should be treated as

answers thereto.[3] The motion improperly presented by respondent should not be entertained. See Rule 16 of the Rules of this Court.

Conclusion.

As noted in petitioner's main brief at page 68, the judgment of the Court of Appeals for the Second Circuit should be remanded with instructions to allow all costs taxed by Judge Palmieri on the first trial, and to allow as costs the total round-trip expenses incurred by Aramco in transporting witnesses to the second trial.

Dated: November 4, 1964

Respectfully submitted,

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[3] See Stern-Gressman SUPREME COURT PRACTICE, 3rd ed. 1962, section 11-8, page 337.